Before the Secretary of the Interior.

MAGNOLIA MINING COMPANY et al.

vs.

MONO MINING COMPANY.

Appeal from Commissioner of General Land Office.

ARGUMENT FOR MAGNOLIA MINING COMPANY,

INCLUDING:

1. Opening Argument before Commissioner.
2. Reply to Argument of Mono Mining Company.
3. Reply to Additional Argument of Mono Mining Company.

HALBERT E. PAINE,
Attorney for Magnolia Mining Company.

WASHINGTON, D. C.:
M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS.
1875.

GENERAL LAND OFFICE, WASHINGTON, D. C.

In the matter of the application of Matthew T. Gisborn and others for a patent for the Mono Mining Claim, in the the Ophir Mining District, Utah Territorg.

ARGUMENT OF H. E. PAINE,

Counsel for Adverse Claimants, Lafayette Granger and Farley B. Granger.

On the 11th day of November, 1872, an application for a patent was filed with G. R. Maxwell, register of the land office at Salt Lake City, by the present Mono claimants, Matthew T. Gisborn, Obadiah Embody, Warren D. Heaton, and William E. Miller.

On the 18th day of December, an adverse claim was filed by the present Magnolia claimants, La Fayette Granger, and Farley B. Granger.

On the 6th day of December, 1872, an action was commenced by the adverse claimants against Gisborn, Embody, Heaton, and Miller, in the district court of the third judicial district of the Territory of Utah, to determine the right of possession of the property, which action is still pending.

On the 18th day of December, 1872, the notice to commence proceedings to determine the right of possession was served upon the adverse claimants by the register.

On the 31st day of December, 1872, the adverse claim of the Shoo Fly was filed.

On the 7th day of January, 1873, William A. Rooks filed an adverse claim.

On the 21st day of May, 1874, after the lapse of 18 months from the filing of the adverse claim, the Mono claimants made an *ex parte* motion before W. Pottenger, register, and G. B. Overton, receiver of the land office at Salt Lake

City, to set aside the adverse claim of the Magnolia claimants as a nullity, and forward the application for a patent, which motion was supported by an argument in writing.

On the 22d day of May, 1872, the next day after the *ex parte* motion was made and argued, the register and receiver made a written decision that the adverse claim of La Fayette Granger and Farley B. Granger was a nullity, that the Shoo Fly claim had been vaived, that the claim of W. A. Rooks was not an adverse claim under the statute, and that the Mono claimants had "done everything necessary to entitle them to a patent," and had "a right to enter their said claim as though there had been no attempt to file an adverse claim."

I.

The register and receiver were not competent to render the decision which purports to have been made by them on the 22d day of May, 1874. The question of the formal sufficiency of the adverse claim of Lafayette Granger and Farley B. Granger was, as to those officers, *res adjudicata.* It was decided by G. R. Maxwell, register of the land office at Salt Lake City, on the 18th day of December, 1872. He was the officer upon whom devolved, under the statute, the power and duty to decide this question. He decided it, not in the way of mere dictum, but as an official act, in the precise mode prescribed by the statute, by giving notice to the adverse claimants to commence proceedings to determine the right of possession. The notice is in these words:

"To GEO. C. BATES, Esq.,

"*Attorney at Law, Salt Lake City:*

"SIR: The adverse claim of the Magnolia East and Magnolia West having been this day filed in this office against the Mono mine, you are hereby given notice, as attorney for the parties for the adverse claim, that you are required within thirty days from date to commence suit in a court of competent jurisdiction.

"Respectfully, yours,

"GEO. R. MAXWELL, *Register.*

"DECEMBER, 18, 1872."

This decision, made by a competent officer, in strict conformity with the statute, cannot be reversed by his successors, but only by a higher authority. See Opinions of Mr. Wirt, 2 Opinions of Attorneys General, 9; Mr. Taney, 2 *id.*, 464; Mr. Nelson, 4 *id.*, 341; Mr. Toucey, 5 *id.*, 29; Mr. Johnson, 5 *id.*, 123; Mr. Black, 9 *id.*, 107, 301, 387; Mr. Stanberry, 12 *id.*, 358; Mr. Hoar, 13 *id.*, 33, 226; Mr. Akerman, 13 *id.*, 387; Mr. Bristow, 13 *id.*, 457; Mr. Bates, 10 *id.*, 255; Mr. Bates, *contra*, 10 *id.*, 61.

On this ground, therefore, the adverse claimants have a right to ask, and do ask, that this case shall be remanded to the local land officers, to await the result of the "proceedings to determine the question of the right of possession" between the parties, now pending in the third judicial district of the Territory of Utah.

II.

The proceeding of May 22, 1874, was *ex parte*. It lacked the first requisite of a fair adjudication—a notice to, and hearing of, both parties. The Magnolia claimants had no notice of the proceeding until after it was consummated. The Mono claimants, and the Mono claimants only, were heard. This mode of adjudicating rights of property is happily unknown to the laws of the United States, although it is not without precedent in the star chamber proceedings of the mother country. There was no good reason why this self-constituted court of review was open to one party and not to the other. There was no good reason why, in the presence of one party, and in the absence of the other, an attempt was made, by a summary decision, based on absurdly rigorous technicalities, to brush aside a claim to property admitted on all sides to be of very great value. For this reason alone, that the proceeding was wholly *ex parte*, the adverse claimants would be entitled to insist that this motion should be remanded to Utah for a fair adjudication upon a reasonable hearing of both parties.

III.

The first conclusion reached by the register and receiver is expressed in the following language: "We have carefully examined the application of the said Mono Mine, and also all of the adverse claims so filed against the application, and we find that the application of the said Mono mining claim has been regular in this office, and that the applicants for a patent for the same have done everything necessary to entitle them to a patent."

The Commissioner will probably reach a different conclusion. He will find that the present Mono claimants, Gisborn, Embody, Heaton, and Miller, have, by their own showing, foreclosed the possibility of obtaining such a patent as they seek. They ask for a patent of a rectangular claim, 1,600 feet in length and 100 feet in width, with its centre line bearing S. 83° 30′ E., and with its centre point at a discovery hole situated in the direction of S. 64° W. from "U. S. Mineral Monument No. 6," and at a distance of 450 feet from that monument. They claim that on the 12th of November, 1871, seven persons undertook to locate the 1,600 feet in *undivided* shares, as follows, W. D. Heaton 266⅔, M. T. Gisborn 266⅔, O. Embody 266⅔, H. D. Converse 200, T. R. Miller 200, Calvin Kirk 200, and E. McKendry 200, in the aggregate 1,600 feet. They say (in paragraph 2 of their application) that the right of these seven persons to claim and hold more than 1,400 feet being questioned, on the 12th day of August, 1872, William E. Miller relocated 200 feet undivided of the 1,600 feet first claimed. And they claim that they, Gisborn, Embody, Heaton, and W. E. Miller, are now, by virtue of proper transfers, the legal owners of the claim to the 1,600 feet.

The following is the notice of location of November 12, 1871, as shown in Exhibit No. 1, attached to the application of the Mono claimants:

"*Notice of Location.*

"We, the undersigned, claim (8) eight claims of (200) two hundred feet each, on the course of this ledge or lead of mineral-bearing rock or earth in place whichever way it may run; the supposed course is easterly and westerly, commencing at this monument and notice and extending each way (800) eight hundred feet, which we intend to hold subject to the mining laws of the United States and the local laws of this district.

"OPHIR DISTRICT, TERRY. OF UTAH, *November* 12, 1871.

"W. HEATON, 266⅔.
"M. T. GISBORN, 266⅔.
"O. EMBODY, 266⅔.
"H. D. CONVERSE, 200.
"T. R. MILLER, 200.
"CALVIN KIRK, 200.
"E. MCKENDRY, 200."

The following is the notice of location of August 12, 1872, as shown by the same Exhibit (No. 1:)

"*Notice.*

"*Mono Relocation of* 200 *feet.*

"I, the undersigned, a citizen of the United States of America, do hereby relocate and claim one claim of two hundred (200) feet in length, undivided ground, in the Mono lode, vein, or deposit of silver-bearing ore, located the 12th day of November, A. D. 1871, and filed for record on the 24th day of November, A. D. 1871, in the office of the recorder of Ophir mining district, Tooele county, Utah Territory, including all the dips, spurs, angles, and variations, and running on and along the course of the lode, vein, or deposit from the monument on which this notice is placed for the distance located.

"I claim this claim on the ground that there is no discovery claimed in the original notice of the location of the said Mono lode, vein, or deposit, as seven persons located sixteen hundred (1,600) feet therein, being an excess of two hundred feet (200) allowed by the act of Congress in such cases made and provided to seven persons when no discovery is claimed.

"And I claim this claim on the further ground that the locators of the said Mono lode, vein, or deposit, are not

entitled to a discovery claim therein, the same lode, vein, or deposit having been previously discovered, located, and recorded under another name.

"W. E. MILLER.

"OPHIR MINING DISTRICT,
"TOOELE COUNTY, UTAH TER., *August* 12, 1872."

The following is the second paragraph of the application for a patent in the case now pending:

"Second. A question being debated whether the said locators were entitled to claim and hold, by said location, the whole of said 1,600 feet, or any more than 1,400 feet thereof, the said applicant, Wm. E. Miller, on the 12th day of August, 1872, with the consent of all the persons then owning and holding the possessory right to said 1,600 feet, relocate 200 feet of the same, by posting a written notice thereon, and having the same recorded by said Mining Recorder on the same day."

Now, if no superior claims had prevented, it would of course have been competent for the seven original locators, on the 12th of November, 1871, either to locate seven separate claims of 200 feet each, which, if contiguous to each other, would constitute in the aggregate a claim of 1,400 feet, or to locate one entire undivided claim of 1,400 feet, in which each should have an undivided share of 200 feet. But it was not competent for them to locate seven separate claims, of which four should contain 200 feet each and three 266⅔ feet each, and which, being contiguous to each other, would constitute in the aggregate a claim of 1,600 feet. Nor was it competent for them to locate one undivided claim of 1,600 feet, in which Heaton, Gisborn, and Embody should own each 266⅔ feet, and Converse, T. R. Miller, Kirk, and McKendry each 200 feet. Nor was it competent for these seven original locators to locate an entire undivided claim of 1,600 feet, in which each should own 200 feet undivided, amounting in the aggregate to 1,400 feet, the remaining 200 feet being without owner. These seven persons could not alone locate 1,600 feet undivided, or any part of 1,600 feet undivided. They could no more fasten on a claim of 1,600 feet, by appropriating seven

eighths undivided of the claim, and leaving one undivided eighth part vacant, than they could fasten on 3,000 feet by claiming seven fifteenths and leaving eight fifteenth parts vacant. The seven original locators could only locate, or claim, interests, whether undivided or in severalty, in 1,400 feet. This location of November 12, 1871, was at its inception a violation of section 4 of the act of July 26, 1866, which provides that "no location hereafter made shall exceed 200 feet in length along the vein, for each locator, with an additional claim for discovery to the discoverer of the lode," and "that no person may make more than one location on the same lode; and not more than 3,000 feet shall be taken in any one claim by any association of persons." The original location was therefore invalid at its inception. It is invalid still, unless it has acquired validity from the so-called relocation of 200 feet undivided, which W. E. Miller attempted to make on the 12th of August, 1872.

If the location of the 1,600 feet has indeed acquired validity from this latter location, then the true date of the entire location is August 12, 1872. The act of W. E. Miller, performed on the 12th of August, 1872, cannot, by relation, have such efficacy that a location by seven persons, which was in reality invalid from November 12, 1871, to August 12, 1872, shall be thereby made valid from November 12, 1871, to August 12, 1872. The most that could be claimed would be that the location of 200 feet undivided by W. E. Miller, with the concurrence of the seven original locators, should be accepted, *in conjunction with such concurrence*, as a virtual new location of the whole in undivided eighth parts on the 12th of August, 1872. But even that would not be justified either by the letter or the spirit of the law. Such slipshod, fragmentary methods would be wholly inadmissible. In the present case, however, not even this claim can be made. It is not pretended that either Converse, T. R. Miller, Kirk, or McKendry ever concurred in any such relocation. On the contrary, it is shown by the Mono claimants themselves that nothing of the kind happened,

or could have happened; and it is further shown by them that, by the action of the original locators, between the 12th of November, 1871, and the 12th of August, 1872, the possibility of a cure of the invalidity of the original location, by virtue of the location of August 12, 1872, had been wholly destroyed. For it is alleged in the 4th paragraph of the application of the Mono claimants that Converse, T. R. Miller, Kirk, and McKendry conveyed 400 feet undivided of the 1,600 feet to Embody on the 17th of February, 1872, and also 400 feet undivided of the 1,600 feet to Embody, Gisborn, and Heaton on the 23d day of May, 1872; so that on the 12th day of August, 1872, when W. E. Miller attempted to give life to this undivided claim of 1,600 feet, four of the original owners had parted with whatever interest they ever pretended to hold in the claim, and they could by no possibility concur in, or consent to, this new location of W. E. Miller. Nor is it pretended that they did so concur or consent. On the contrary, it is alleged in the 2d paragraph of the application that "Wm. E. Miller, on the 12th day of August, 1872, with the consent of *all the persons then owning and holding the possessory right* to said 1,600 feet," relocated the same. It is therefore not claimed that Converse, T. R. Miller, Kirk, or McKendry ratified this new arrangement, so as to make it relate back to and validate their orginal locations. It is probably claimed that the consent of their grantees, Embody, Gisborn, and Heaton gave to this attempted location of W. E. Miller such efficacy that it cured the original invalidity of the entire location, notwithstanding one-half of the original locators had parted with all interest in the 1,600 feet, and the whole had passed to four claimants, the present applicants for the patent. But this claim cannot be maintained.

In the first place, the only theory upon which the location of 200 feet by W. E. Miller, in 1872, could, by any possibility, be permitted to patch up, and make complete, a location of 1,600 feet made by seven persons in 1871, is that when Miller acted the other seven also virtually acted

anew *as locators*, being qualified and competent under the law. If it was impossible for seven persons, on the 12th day of November, 1871, to locate 1,600 feet, by taking undivided shares therein, *a fortiori* was it impossible for four persons, on the 12th day of August, 1872, to locate 1,600 feet, by the circuity of a purchase of a part and a relocation of the residue. The question is not whether undivided interests can be purchased and consolidated after location, but whether they can be located after purchase and consolidation. To this question there is but one answer.

In the second place, if it is true, as alleged in the 4th paragraph of the application for a patent, that Converse, T. R. Miller, Kirk, and McKendry attempted to convey 400 feet undivided of the 1,600 feet to Embody, on the 17th of February, 1872, and 400 feet undivided to Embody, Gisborn, and Heaton, on the 23d of May, 1872, yet by such conveyance these grantees acquired no interests in the claim;—for the grantors did not, and could not, hold any interest in the 1,600 feet undivided capable of transfer,—their claim was invalid in their own hands, and it gained nothing by a transfer to other hands. The fatal illegality of a location of 1,600 feet by seven claimants is not cured by a transfer to four or to four hundred. If possible, it would rather be aggravated by such illegal transfer. The illegality would be made twofold.

But, in the third place, the allegation of the fourth paragraph of the application, that Converse, T. R. Miller, Kirk, and McKendry, conveyed *undivided* interests of 400 feet on the 17th of February and 23d of May, 1872, is not established by the abstract of conveyances presented by the Mono claimants in Exhibit No. 2. It does not appear whether grants of undivided or several interests were attempted. While both would be equally illegal, yet, under the circumstances, the latter would be rather more absurd.

The attempt, therefore, to make any use of the imaginary interests of Converse, T. R. Miller, Kirk, and McKen-

dry in this patchwork wholly fails. If Heaton, Gisborn, and Embody have succeeded, by their consent to Miller's arrangement, in imparting any virtue to their own original individual locations, that is the limit of their success. But they have not even accomplished that. Four persons cannot alone locate *any undivided interest in* 1,600 *feet.* They can neither locate the whole, nor 800 feet undivided, nor any other undivided part of 1,600 feet. So the present application of the Mono claimants for a patent, must, in any event, be denied, and they must resort to a new application, if not also to a new location, to secure whatever interests they may have in these mines.

To meet the requirements of the 41st regulation of the General Land Office, the following paper is filed:

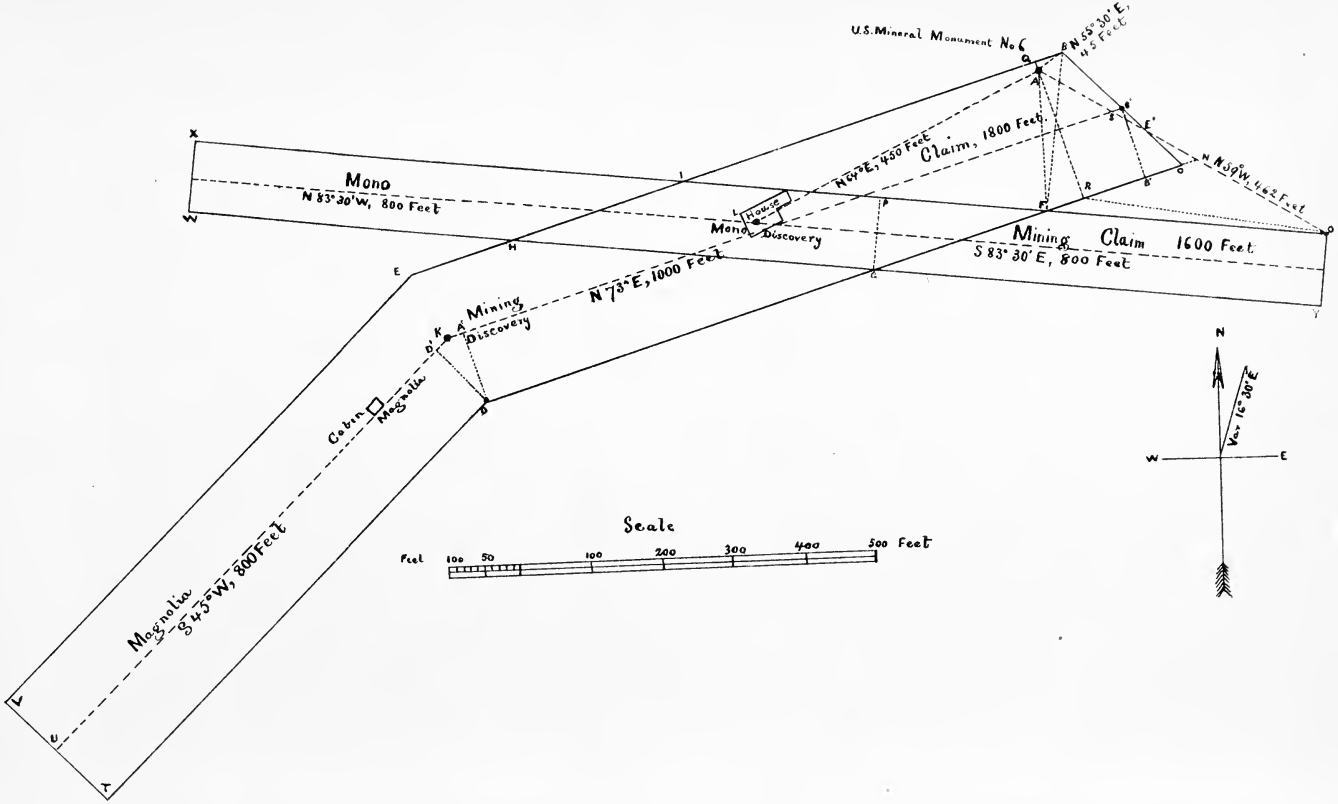
"UNITED STATES LAND OFFICE,
SALT LAKE CITY.

"I hereby certify that the accompanying plat and notice was posted in this office in a conspicuous place for the full period of sixty (60) days, to wit, from the 12th day of November, 1872, to the 13th day of January, 1873, both dates inclusive. GEO. R. MAXWELL, *Register.*"

This document is without date. But Willett Pottinger, the present register of the land office at Salt Lake City, in his letter of transmittal of May 22, 1874, says: "The papers are complete with the exception of George R. Maxwell's (former register) signature to the posting of the plat and notice in a conspicuous place in this land office for the period of sixty (60) days. Mr. Maxwell is now in Washington; has been requested to call at the General Land Office and furnish the same." The regulation requires the register, not the marshal, to certify to this fact. Mr. Maxwell's statement was made after May 22, 1874, and was no more an official certificate than would be a similar statement from Mr. Embody himself.

IV.

Passing over the points in the decision of the register and receiver which relate to other adverse claimants, I will


U.S. Mineral Monument No 6
N 55° 30' E, 45 Feet
Mono
N 83° 30' W, 800 Feet
N 6° E, 450 Feet
Claim, 1800 Feet.
N 89° W, 462 Feet
House
Mono Discovery
Mining Claim 1600 Feet
S 83° 30' E, 800 Feet
N 7° E, 1000 Feet
A Mining Discovery
Cabin
Magnolia
Magnolia
S 45° W, 800 Feet
Scale
Feet 100 50 0 100 200 300 400 500 Feet
N
Var. 16° 30' E
W
E

next consider the four grounds on which they base their conclusion that the adverse claim of Lafayette Granger and Farley B. Granger is to be dismissed as a nullity.

The first is stated generally in these words: "In the first place the adverse claimants have utterly failed to designate the points of conflict between the Mono application and the Magnolia adverse claim, either by the plat of survey, which they have filed with their adverse claim, or by any of the allegations set forth in the adverse claim itself." In this the officers are wholly mistaken. On the contrary, in the plat which accompanies and constitutes a part of their adverse claim, they fix the "points of conflict" with such precision that a surveyor can, by means of that plat, lay out upon the ground the quadrilateral in dispute with the utmost accuracy of which such work admits. They give as the point of reference United States Mineral Monument No. 6, and connect with this monument, directly or indirectly, by bearings and distances, the discovery holes and corners of the Magnolia and Mono claims, and the four points at which their boundaries intersect each other. With the aid of this plat, and without any other data whatever, the surveyor can, by the usual calculations, ascertain the distances and bearings of the corners of the overlap from Monument No. 6, from the corners of the respective claims, and from each other. *Id certum est quod certum reddi potest.* And proceeding to the ground, with no other data except such as are furnished by this plat, he can lay out the parallelogram of intersection of the Magnolia and Mono claims with the highest degree of precision attainable in such cases.

The accompanying plate is a copy of the diagram or plat which was filed with the adverse claim. It contains nothing which the plat itself does not contain, except the dotted lines DD′, D′K, A′D, A′K, CN, B′C′, OR, AR, BF, AF, and AQ, which are introduced for use in the calculations, in which only the elements furnished by the plat are used.

The initial point B of the boundary of the Magnolia

claim is shown by the plat to be N. 55° E., 45 feet from the United States Mineral Monument, No. 6. The first course, BC, being parallel with the southwest end, TV, of the Magnolia West, which is at right angles with the centre line KU of the Magnolia West, has a bearing of S. 45° E., and passes through the extremity of the centre line of the Magnolia East. The distance BC is readily ascertained, being the hypothenuse of a right-angled triangle, of which the base is 200 feet, the width of the Magnolia claim, and the acute angle C is the supplement of 73°+45°=62°. This distance (BC) is 226 feet.

The second course CD=C′K+B′C—A′K. But C′K=1,000 feet. A′K is readily found to be 25 feet, being the altitude of a right-angled triangle, of which the base A′D=100 feet, one-half the width of the Magnolia claim; the angle A′KD=$\frac{1}{2}$ (45°+17°+90°)=76°; and the angle A′DK=90°—76°=14°. In like manner B′C is found to be 53 feet, being the altitude of the right-angled triangle B′CC′, of which two sides and all the angles are known. Therefore the second course C D=C′K+B′ C—A′K=1,000+53—25=1,028 feet. The bearing of this course is shown to be S. 73° W.

The third course DT=UK—D′K=800—25=775 feet; and its bearing is S. 45° W.

The fourth course TV is N. 45° W. 200 feet.

The fifth course VE=TD+2D′K=775+50=825 feet; and the bearing is laid down as N. 45° E.

The sixth and last course EB=KC′+KA′—B′C=1000+25—53=972 feet.

The distances and directions of the point of intersection F of the Magnolia and Mono claims from the corners B and C of the Magnolia, the corner O of the Mono, and the United States Mineral Monument, No. 6, (A,) respectively, may be ascertained as follows:

In the triangle ABE′ the side AB=45 feet; the angle ABE′=45°+55° 30′=100° 30′; the angle BAE′=supplement of 55° 30′+59°=65° 30′; the angle AE′B=14°.

Sin AE′B 14°, (Ar. Comp.,)	.616325
Sin BAE′ 65° 30′	9.959023
AB 45 feet	1.653213
BE′ $169\frac{3}{10}$ feet	2.228561

Sin AE′B 14°, (Ar. Comp.,)	.616325
Sin ABE′ 100° 30′ (79° 30′)	9.992666
AB 45 feet	1.653213
AE′ $182\frac{9}{10}$ feet	2.262204

But CE′=BC—BE′=226—$169\frac{3}{10}$=$56\frac{7}{10}$ feet.

Hence in the triangle CE′N the side CE′=$56\frac{7}{10}$ feet; the angle CE′N=14°; the angle E′CN=180°—B′CE′=180°—62°=118°;the angle CNE′=48°.

Sin CNE′ 48°, (Ar. Comp.,)	128927
Sin E′CN 118° (62°)	9.945935
E′C $56\frac{7}{10}$ feet	1.753583
E′N $67\frac{37}{100}$ feet	1.828445

Sin CNE′ 48°, (Ar. Comp.,)	.128927
Sin CE′N 14°	9.383675
CE′ $56\frac{7}{10}$ feet	1.753583
CN $18\frac{46}{100}$ feet	1.266185

In the triangle FNO the side NO=AO—(AE′+E′N)=462—$250\frac{27}{100}$=$211\frac{73}{100}$ feet; the angle FON=83° 30′—59°=24° 30′; the angle NFO=supplement of 73°+83° 30′=23° 30′; the angle FNO=132°.

Sin NFO, 23° 30′, (Ar. Comp.,)	.399300
Sin FON, 24° 30′	9.617727
NO, $211\frac{73}{100}$ feet	2.325721
FN, $220\frac{2}{10}$ feet	2.342748

But CF=FN—CN=$220\frac{2}{10}$—$18\frac{46}{100}$=$201\frac{74}{100}$ feet.

And Sin NFO, 23° 30′, (Ar. Comp.,)	.399300
Sin FNO, 132°, (48°)	9.871073
NO $211\frac{73}{100}$	2.325721
FO 394	2.596094

To find the distance and direction of F from B:

In the triangle CBF the side BC=226 feet; the side CF=$201\frac{74}{100}$ feet; the angle BCF=62°; the angles BFC+CBF=118°.

BC+CF, $427\frac{74}{100}$ feet, (Ar. Comp.,)	7.368861
BC—CF, $24\frac{26}{100}$ feet	1.384891
Tan. $\frac{1}{2}$ (BFC+CBF) 59°	10.221226
Tan. $\frac{1}{2}$ (BFC—CBF) 5° 23′	8.974978

Hence the angle BFC=64° 23′; the angle CBF=53° 37′; therefore,

Sin CBF, 53° 37′, (Ar. Comp.,)	.094168
Sin BCF 62°	9.945935
CF $201\frac{74}{100}$ feet	2.304706
BF $221\frac{2}{10}$ feet	2.344809

BF is S. 8° 37′ W. $221\frac{2}{10}$ feet.

To find the distance and direction of I from B.

In the triangle BFI the side BF=$221\frac{2}{10}$ feet; the angle FBI=73°—8° 37′=64° 23′; the angle BIF=23° 30′; the angle BFI=92° 7′.

Sin BIF, 23° 30′, (Ar. comp.,)	.399300
Sin BFI, 92° 7′, (87° 53′,)	9.999704
BF $221\frac{2}{10}$ feet	2.344785
BI $554\frac{3}{10}$ feet	2.743789

BI is S. 73° W. $554\frac{3}{10}$ feet.

To find FI, one of the sides of the overlap:

Sin BIF, 23° 30′, (Ar. Comp.,)	.399300
Sin FBI, 64° 23′	9.955065
BF, $221\frac{2}{10}$ feet	2.344785
FI, $500\frac{2}{10}$ feet	2.699150

To find the side FG:

In the triangle FGP the side GP=width Mono claim= 100 feet; the angle FPG=90°; the angle GFP=23° 30′; the angle FGP=66° 30′.

Sin GFP, 23° 30′, (Ar. Comp.,)	.399300
Sin FPG, 90°	10.000000
GP 100 feet	2.000000
FG $250\frac{8}{10}$ feet	2.399300

FG is S. 73° W., $250\frac{8}{10}$ feet.

In some of the foregoing calculations the bearing and distance BC are used as elements. This is proper, for the plat shows upon its face, without the aid of figures or letters, that the southwest end of the Magnolia West is at right angles with the center line, and that the northeast end of the claim is parallel with the southwest end. This evidence of the plat acquires, although it does not need, confirmation from the statutory provisions relating to the subject. The act of July 26, 1866, contains no direct provision respecting the contents of the location notice. Indeed, it does not even provide for posting or recording any such notice. By virtue of the first section of the act, the contents of the notice, as well as the mode of posting and recording it, were prescribed by the local rules or laws of the miners of the district. The rules of this district, in force from August 6, 1870, to June 10, 1872, did not require the notice, except in cases of tunnel locations, to contain any statement respecting the extent or direction of the end lines of a claim. They required the notice to contain a statement of the *length* along the lode, but not of the *width* of the claim. The width was determined by the third section of the miners' laws, and not by anything in the location notice. Furthermore, it was not required to state, in the notice, *the direction of the end lines*, nor was there in the written rules or laws of the miners any provision regulating the *direction* of these lines The rules require that the notice shall show (1) the *length* of the claim, (2)

the length of the claim on each side of the monument, (3) the names of the locators, (4) the number of feet claimed by each, and (3) the name of the lode. Provision is also made for posting and recording the notice. When the claimant comes to apply for his patent, under the second section of the act of 1866, he must, in his plat or diagram, determine the lateral extension of his claim in accordance with the local laws, customs, and rules of miners.

If the application of the Mono claimants for a patent had been made before the enactment of the law of May 10, 1872, the direction of the end lines of the claim, if capable of deviation from perpendicularity to the center line of the claim, would have been subject, perhaps, to the *unwritten* customs and rules of miners in force at the time. And the adverse claim of the Magnolia claimants would have been subject to the same rules. But this was all changed by the act of May 10, 1872. By the second section of the new act it is provided that the *length* of the claim shall be governed by the customs, regulations, and laws in force at the date of the location. This excludes the idea that the *width* is to be so governed. Still more clearly does it exclude the idea that the *direction* of the end lines, which was not covered by written regulations at all, shall be so governed. Besides, it is provided, in the last clause of the section, that "the end lines of each claim shall be parallel to each other." This latter provision is applicable to the present case. The southwest end of the claim being laid down on the plat at right angles with the course of the claim, the northeast end is required by the statute to be, as the plat shows it is, parallel therewith; and its bearing is S. 45° E. And this could hardly be more clear than it now is, even if the surveyor had not, by an oversight, omitted to record on the plat the bearings of these two end lines, but had, in fact, indicated the first as S. 45° E, and the other as N. 45° W. Whether the statute, however, does or does not require these two ends to be parallel, the map shows that they are parallel.

But if the adverse claimants are to be distinguished by

confinement in this straight-jacket of formality, and not permitted to use, as elements of their case, the bearing and length of the first course BC, fortunately for them this unwonted rigor will not prove fatal or seriously injurious. For if those elements shall be wholly omitted, the other data of the plat and adverse claim will not only give the form, dimensions, boundaries, and position of the overlap, which is the essential requirement, but also all the sides and angles of both claims, except only the end BC and the exact length of the side CD, which latter they will determine with an approximation towards exactitude considerably in excess of the demands of the case.

To find the several bearings and distances without using the course BC:

Draw AR at right angles with CD, AQ, at right angles with BE, and draw OR.

Then in the triangle ABQ the side AB=45 feet; the angle AQB=90°; the angle ABQ=73°–55° 30′=17° 30′; the angle BAQ=72° 30′.

Sin AQB, 90°, (Ar. Comp.,)	.000000
Sin ABQ, 17° 30′	9.478142
AB, 45 feet	1.653213
AQ, $13\frac{53}{100}$ feet	1.131355
Sin AQB, 90°, (Ar. Comp.)	.000,000
Sin BAQ, 72° 30′	9.979420
AB, 45 feet	1.653213
BQ, $42\frac{92}{100}$ feet	1.632633

In the triangle AOR the side AO=462 feet; the side AR=200—$13\frac{53}{100}$=186.$\frac{47}{100}$ feet; the angle OAR=OSK—90°=132°—90°=42°.

AO+AR, $648\frac{47}{100}$ feet, (Ar. Comp.)	7.188090
AO—AR, $275\frac{53}{100}$ feet	2.440122
Tan $\frac{1}{2}$, (ARO+AOR,) 69°	10.415823
Tan $\frac{1}{2}$, (ARO—AOR,) 47° 54′	10.044035

Hence the angle ARO=116° 54′, and the angle AOR= 21° 6′.

Sin AOR, 21° 6′, (Ar. Comp.,)	.443701
Sin OAR, 42°	9.825511
AR, 186_{100}^{47} feet	2.270679
OR, 346_{10}^{7} feet	2.539891

In the triangle FOR the side RO=346_{10}^{7} feet; the angle FOR=AOF—AOR=24° 30′—21° 6′=3° 24′; the angle OFR=23° 30′; the angle FRO=153° 6′.

Sin OFR, 23° 30′, (Ar. Comp.,)	.399300
Sin FRO, 153° 6′ (26° 54′)	9.655556
OR 346_{10}^{7} feet	2.539954
FO 394	2.594810

The distance from O to F is therefore 394 feet.

To find the distance of the point of intersection F from the foot of the perpendicular drawn from the corner B to the side CD of the Magnolia claim, without using the course BC:

Sin OFR 23° 30′, (Ar. Comp.,)	.399300
Sin FOR 3° 24′	8.773101
OR 346_{10}^{7}	2.539954
FR 51_{100}^{56}	1.712355

But the distance of the point of intersection F from the foot of the perpendicular drawn from B to CD is equal to FR+BQ=51_{100}^{56}+42_{100}^{92}=94_{100}^{48} feet.

By means of the triangle ARF the distance and bearing of the point of intersection F from the United States Mineral Monument No. 6 is readily ascertained without using the course BC.

And the point of intersection F being so fixed with reference to B, A, and O, respectively, without the use of the course B C, the lengths of the sides of the overlap are all readily ascertained without any use of the course BC. The bearings of those sides are laid down on the plat. So

the boundaries of the overlap are fixed with the utmost precision without any use of the course BC.

Omitting from consideration the bearing and distance BC, we nevertheless find, from the other data of the plat, that CF *must be very nearly* 200 feet. For by extending OA to its intersection with EB, and drawing a line from B, through S, the intersection of AO and KC′, to DC, we cut off equal distances on EB and ND, which are readily found to be 55 feet. If therefore BC and AO intersected each other at N, CF would equal FN, which has already been shown, without the use of the bearing or distance BC, to equal $220\frac{2}{10}$ feet. If these lines intersected at S, the intersection of AO and KC′, FC would equal FN—55 feet=$165\frac{2}{10}$. But the relation of E′, the point of intersection of BC and AO to the other two points, N and S, as laid down on the plat, is such as to show that FC must be very *nearly* 200 feet.

A change in CF will not affect BI. The changes in EH and DG will be only one-half that in CF. For two lines drawn from B to CF. cut off, on KC′, only one-half the distance cut off on CF.

The following, then, are the bearings and distances shown by the adverse claim and plat:

AB N. 55° 30′ E. 45 feet;	AL S. 64° W. 450.
AO S. 59° E. 462;	AR S. 17° E. $186\frac{47}{100}$;
BC S. 45° E. 226;	CD S. 73° W. 1028;
DT S. 45° W. 775;	TV N. 45° W. 200;
VE N. 45° E. 825;	EB N. 73° E. 972;
CF S. 73° W. $201\frac{74}{100}$;	OF N. 83° 30′ W. 394;
BF S. 8° 37′ W. $221\frac{2}{10}$;	RF S. 73° W. $51\frac{56}{100}$;
FG S. 73° W. $250\frac{8}{10}$;	GH S. 73° W. $500\frac{2}{10}$;
HI N. 73° E. $250\frac{8}{10}$;	IF S. 83° 30′ E. $500\frac{2}{10}$;
GD S. 73° W. $575\frac{46}{100}$;	BI S. 73° W. $554\frac{8}{10}$;
HE S. 73° W. $166\frac{4}{10}$.	

The register and receiver are therefore wholly mistaken when they say generally that, "in the first place, the adverse claimants have utterly failed to designate the points of conflict between the Mono application and the Magnolia

adverse claim, either by the plat of survey, which they have filed with their adverse claim, or by any of the allegations set forth in the adverse claim itself."

The register and receiver are equally mistaken when they add, with more particularity: "On a careful examination of the plat, we merely find a plain plat, with lines drawn in different directions." They must have been well-nigh blind when they made this careful examination. If they saw only "lines drawn in different directions," it was not because there was nothing else to see; for the plat not only shows lines drawn in different directions, but it also shows—

1. That the northernmost point of the Magnolia claim is 45 feet distant from United States Mineral Monument No. 6.

2. That the direction of this point is N. 55° 30′ E. from the monument.

3. That the discovery hole of the Mono claim is 450 feet distant from the monument.

4. That the direction of this discovery hole is S .64° W. from the monument.

5. That the northeastern corner of the Mono claim is 462 feet distant from the monument.

6. That the direction of this corner is S. 59° E. from the monument.

7. That the length of the centre line of the Magnolia East is 1,000 feet.

8. That the bearing of this line is N. 73° E.

9. That the length of the centre line of the Magnolia West is 800 feet.

10. That the bearing of this line is S. 45° W.

11. That the length of the centre line of the Mono claim east of the discovery hole is 800 feet.

12. That the bearing of this line is S. 83° 30′ E.

13. That the length of the centre line of the Mono claim west of the discovery hole is 800 feet.

14. That the bearing of this line is N. 83° 30′ W.

15. That the southwest end of the Magnolia West,

being at right angles with its centre line, bears N. 45° W.

16. That the northeast end of the Magnolia East, being parallel with the last-mentioned line, bears S. 45° E.

These things, which the register and receiver failed to see, should not be overlooked by the Commissioner. They are precisely the things which—taken in connection with the averments of the adverse claim, that the Magnolia claim is 200 and the Mono 100 feet in width—render the designations of the adverse claim not merely sufficient, but so absolutely complete as to lack nothing essential to the most accurate and perfect survey that can in any case possibly be made.

In further particularization the register and receiver say that "they find no field-notes" on the plat. In this, too, they are mistaken. The foregoing sixteen items are all virtually field-notes, and nothing else. It is true that they are not written down one under another, in column, but are written along the lines of which they designate the lengths and bearings. But such a quibble sticks in the very outer bark. It sacrifices the substance to a thin shadow of technicality. It would be as proper to say that a promissory note is not a promissory note, because the signature is placed, not as usual, at the lower right-hand corner, but at the lower left-hand corner. But, then, it is wholly immaterial whether they are technical "field-notes" or not. They show the bearings and distances. And if that is done, it is immaterial whether it is done by "field-notes," technically so called, or by some other means.

Equally erroneous is the assertion that there are "no monuments to designate the points in conflict." Mineral Monument No. 6 is given, with its relations to all the important points of the Magnolia and Mono claims, by means whereof the points of intersection are designated with *mathematical precision*. It is true that there are no pictures of "monuments" or of "stakes" on the plat. It is equally true that there ought to be none. The *points* are given. Anything beyond would be supererogatory, not to say puerile. There is nothing in the statement that there

are on the plat no "colors to designate the points in conflict." It is possible that a small boy might not perceive the overlap of two intersecting *linear* parallelograms, unless the overlap should be painted, but he would be a very small boy indeed. And if these land officers mean that colors would be of material aid to their comprehension of the overlap of the Magnolia and Mono claims, I hardly know what to say that would not assail either their intelligence or their candor.

Not less erroneous is the next statement of the land officers, which is in these words:

"And upon a careful examination of the allegations in the adverse claim, we find that confusion becomes worse confounded."

In the first place, there was no confusion to "confound." The plat is neither obscure nor ambiguous. It furnishes the data, and all the necessary data, for as perfect an understanding and description of this interference as could, in any case, possibly be attained—a description as full and complete as the most punctilious conveyancer could even suggest for a deed of the property. But, in the next place, the allegations not only do not aggravate, but they do not originate confusion. That which is clear without the allegations is left clear by the allegations. It is only the misconception or misconstruction of the land officers that tends to make confusion.

Still further the land officers say:

"We find all the allegations to this matter to this effect: that the application for a patent for the Mono mine laps over and cuts off about 1,000 feet in length of said lode, the property of these adverse claimants, &c.; and refers to the plat on file. In referring to the location notice of the Magnolia East they claim only 1,000 feet in length, while on the plat so filed there is not as much as one fourth of the one thousand feet of the said Magnolia claim that is embraced inside of the lines drawn on said plat and marked 'Mono' mine."

Now what these officers evidently mean is to state four propositions of fact, as embraced in the adverse claim,

which shall appear to be inconsistent with each other, viz:

1. That the adverse claimants allege that the Mono claim overlaps about 1,000 feet in length of the Magnolia claim.

2. That they allege that the Mono claim cuts off about 1,000 feet in length of the Magnolia claim.

3. That the Magnolia East is, altogether, only 1,000 feet in length.

4. That the plat shows that the overlap embraces in its limits less than one-fourth of the Magnolia East.

The inconsistency which the land officers find here seems to be that in the allegation of the adverse claim the overlap is made to embrace nearly the whole of the 1,000 feet of the Magnolia East, but in the plat it is shown to embrace less than one-fourth part. But this confusion is in the minds, or, to be more accurate, perhaps, in the words of the land officers themselves.

The allegation of the adverse claimants on this point has already been cited for another purpose. It is in the following words:

"Said Mono Mining Claim, as shown by the notice and diagram posted on said claim, and the copy thereof filed in the United States land office, Salt Lake, with said application for a patent, laps over upon, and cuts off about one thousand feet in length of, the said lodes and property of these adverse claimants, as fully appears by the diagram and map hereto attached, marked exhibit "F," of the relative locations of the said Magnolia West and Magnolia East, and the Mono Mining Claim."

What the adverse claimants mean and say, so far as the overlap is concerned, is that *the Mono laps over upon the Magnolia*. They also say that the Mono *cuts off* about 1,000 feet of the Magnolia. They do not mean to say that the Mono laps "over upon about 1,000 feet in length" of the Magnolia, and "cuts off about 1,000 feet in length" of the Magnolia, but what they do mean is precisely what they say, that the former "laps over upon, and cuts off about 1,000 feet in length of, the said lodes," &c. The land officers, by their manipulation of prepositions and commas, give to words a meaning which the context and the plat show to

be a perversion. They sweep away a title to a valuable mine by a discovery of the wrong objective case for the preposition "upon," making the allegation to be that the Mono laps over, not "upon the said lodes," but "upon about 1,000 feet in length" of them. If anything were needed beside the context of the averment to show the error of this construction, it would be found in the plat itself, to which, in this very allegation, the adverse claimants refer as indicative of the nature of the overlap. That plat shows that two parallelograms, one 200 feet and the other 100 feet in width, and one only 1,000 feet in length, intersect each other at an angle of 23° 30′. The idea that it was meant that, under those conditions, one overlapped the other throughout its whole extent, is of course absurd.

But if the land officers conceive that when the adverse claimants allege that the Mono claim "cuts off about 1,000 feet in length" of the Magnolia claim, they mean that the former overlaps the latter about 1,000 feet in length, they obviously attribute a new sense to the words "cuts off." If a parallelogram is "cut off" by a mere line, the overlap is nothing. If it is cut off by another parallelogram, the extent of the overlap will depend on the width of the bisecting parallelogram. But the number of feet in length cut off will depend on the point of section. In this case the length cut off *was about* 1,000 feet. It was *exactly* $805\frac{6}{10}$ feet. For that is the exact distance from B to H on the plat. There is, then, no inconsistency between the location notice, the plat, and the averment, on this point. Taken together, they clearly exhibit the nature and extent of the alleged conflict between the two claims.

It is not incumbent on the adverse claimant to state his claim with as much precision or particularity as is required of the applicant for a patent. When the application is first made, there is no presumption that there will be any contest, and therefore the statement must, on its face, show that the applicant has complied with the law; and such a description "as shall identify the claim and furnish an accurate description, to be incorporated in the patent,

must be filed." (Sec. 6.) When the adverse claim is filed, the question whether the law has or has not been complied with is to be determined by the courts, and there is not the same necessity for showing the details of such compliance in the adverse claim itself. And the statute expressly provides that the party may afterwards, if he succeeds, file the "description required in other cases." (Sec. 7.)

The adverse claim is not intended as the foundation of the patent. But with the successful adverse claimant the judgment roll takes the place of the application, excepting in so far as the 7th section provides for filing other documents with the judgment roll.

The Commissioner will not seek in technicalities an excuse for withdrawing the merits of the case from the courts, but will rather incline to the adoption of a rule of construction that will secure to the parties a fair adjudication of their rights.

If it should be decided that the adverse claim is imperfect, the adverse claimants would ask that the case be remanded to the register at Salt Lake, with instructions for the allowance of a reasonable time for amendment.

It would not be consistent with the policy of the Government, nor with reason or justice, to hold parties in the land office to a practice so strict as to exclude amendments in cases of this kind. If the register had not accepted the adverse claim as sufficient when first filed, it could have been amended, or a new claim filed, within the time allowed by law. It would be gross injustice to make a ruling in favor of the adverse claimants before the time for filing an adverse claim had expired, and then reverse the ruling after the time had expired, and still cut off all possibility of amendment. The adverse claimants ought to have had notice of the action of the register and receiver at the time they made their ruling of the 22d of May last, and to have been permitted to amend at that time, if they had desired to do so.

And if it were possible for an objection to be taken, at

this late day, to the form of the adverse claim, the same right of amendment would still exist. It has neither been barred nor waived, and it cannot be filched away by any such *ex parte* action as was had on the 22d of May, 1874.

Courts always permit pleadings to be amended in analogous cases; and with most liberality where the parties would otherwise be barred by the statute of limitation. Certainly the practice in this department should be surrounded with as few technicalities as possible, and not made so rigorous and strict as to require the sacrifice of rights to property of great value to mere mistakes in pleading.

The second reason assigned for the dismissal of the adverse claim is this:

"We also find that there is no allegation in the said adverse claim that any part of the vein or lode discovered on the Magnolia claim extends and runs under the ground of the application of the Mono, nor do they allege that the Mono mines discovery, vein, or lode is the same vein or lode of silver-bearing rock as that of the Magnolia."

The meaning of this is that, under the last clause of section 3 of the act of July 26, 1866, it is necessary that the adverse claim should contain an averment that the Mono discovery and the Magnolia discovery are on the same vein or lode, and that it does not contain such an averment. On both points the applicants are mistaken. The adverse claim is not required to contain such allegation. But it does contain it.

The clause referred to is in these words:

"But said plat, survey, or description shall in no case contain more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued."

The "plat, survey, and description" are those embraced in the application for a patent. The whole section applies, not to adverse claims, but to the issue of patents in the absence of adverse claims. And the statute does not even require that the *application* for the patent shall contain a *spe-*

cific allegation that all the metaliferous portions of the claim belong to the discovery lode. Nor does the application of the Mono claimants, in the present case, contain any such specific allegation. Still less does the statute require, either expressly or by implication, that an adverse claim shall contain such a specific allegation. On this point, in the case now under consideration, the allegations of the application for a patent and of the adverse claim are alike. In neither is it specifically alleged, but in each it is substantially indicated, that the whole of the claim belongs to the discovery lode. But, as a matter of fact, the identity of the Mono and Magnolia is shown not only by the general scope and effect of the adverse claim and plat, but also by express averment in the following, among other passages:

"Said Mono mining claim, as shown by the notice and diagram posted in said claim, and the copy thereof filed in the United States land office, Salt Lake, with said application for a patent, laps over upon and cuts off about one thousand feet in length of the said lodes and property of these adverse claimants, as fully appears in the diagram and map hereto attached, marked Exhibit "F," of the relative locations of the said Magnolia West and the Magnolia East and the Mono mining claim."

With this argument I present the affidavits of Edwin Gilman, superintendent of the Magnolia mine, and T. H. Robison, a practical miner, showing that the Mono shaft, or incline, is in the Magnolia lode.

It is to be remembered that W. E. Miller, one of the applicants for a patent who make affidavit to the application in this case, attempted his relocation on the 12th of August, 1872. He alleged in his location notice, as has already been shown, that "the locators of the said Mono lode, vein, or deposit, are not entitled to a discovery claim therein, the same lode, vein, or deposit having been previously discovered, located, and recorded under another name." This is proof, so far as it goes, that there is no "Mono" lode; that the Mono applicants are either on the Magnolia lode or Shoo-Fly lode, or on the intersection of

those two lodes. Very prudently, Mr. Miller withheld the "other name" of the lode, so that it may be "Magnolia" or "Shoo-Fly," as the exigencies of the case may require.

This averment of identity is wholly immaterial to the present case, in which the *Mono discovery* lies within the lines of the Magnolia claim. If such an averment could be material to an adverse claim in any case, it would be in a case where the surface areas of the conflicting claims should not overlap, but the adverse claimant should seek to fix his own rights to follow his lode under the claimants' land. But, even in that case, the materiality of the averment would be very doubtful, to say the least. For by section 2 of the act of July 26, 1866, under which the Magnolia claimants acquired their rights, it is provided that the claimant who has complied with the condition prescribed shall be entitled "to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." This provision renders it unnecessary for one of two contiguous claimants to have the question of his rights in his neighbor's land adjusted, though an adverse claim, whenever his neighbor sees fit to apply for a patent. His right under the statute is a right, not to take a patent of his neighbor's land, but to follow his lode or vein into his neighbor's land; and his neighbor takes his patent subject to this right. He is not compelled to follow his vein or lode to its *end* in a month, or a year, or five years. *Whenever*, in the legal prosecution of his work, he reaches that point in his lode where it crosses the boundary of his neighbor's land, if his is the prior claim, he is entitled to follow it downward across the line, whether this occurs in a day, or a year, or ten years, before or after his neighbor's patent issues.

The land office is not competent to put the patent in such a form as to impair in the slightest degree this right. Inasmuch, therefore, as this right is wholly independent,

as well of the form of the patent, as also of the question whether a patent for adjoining land is or is not issued, not only is the averment of such a right in an adverse claim unnecessary, but the adverse claim itself is wholly unnecessary for the vindication of such a right. But however this might be in a case where the surface areas of claims did not overlap each other, one proprietor merely claiming a right to follow his vein or lode under his neighbor's claim, in the case now under consideration there is not a shadow of a pretext for the requirement of such an allegation in the adverse claim in this case. The ground in dispute is not contiguous ground, but an overlap. And not only is it an overlap, but the very discovery hole itself of the Mono is claimed to fall within this overlap. The Magnolia claimants do not seek to follow their vein or lode into a neighbor's ground under section 2 of the act of July 26, 1866. They claim that this ground itself is their own. They would not deem it necessary to take any notice of this case in the land department merely for the purpose of following their own lode into that part of the Mono claim which does not lie within the limits of the Magnolia claim. If their complaint were merely that the Mono claimants were taking ore from the Magnolia vein or lode at points within the Mono claim, but not within the Magnolia claim, the remedy would be sought not in the land office, but in the courts, if anywhere. But the complaint is that the Mono claimants have not only laid a part of their claim within the superficial limits of the Magnolia claim, but have actually made their discovery within those limits, and are taking out ore therefrom.

The third objection of the register and receiver to the formal sufficiency of the adverse claim is, that there is a variance between the location notice and the survey in the bearing of the claim; that in the notice the direction is shown to be easterly, in the survey southeasterly. The following is their language on this point:

"And on examination of the location notice of the Mag-

nolia East, that it calls for 1,000 feet running in an easterly direction, while the survey for the adverse claim runs in a southeasterly direction. It might be allowable for a survey to deviate a few degrees from the direction of the location, but in all such cases it should be alleged and shown that the deviation was made for the purpose of following the vein or lode so discovered, and on which the claim was so located."

The rule laid down seems to be, that while a small variance between the notice of location and survey is admissible, yet, in order to obviate objection to such variance, it must be specifically alleged in the adverse claim that the deviation was made for the purpose of following the vein or lode. But, in the first place, it will be seen that this rule is laid down only for one of the parties to this controversy; that the other is exempted from its operation.

For while it is true that in the Magnolia location notice the bearing of the "Magnolia East" is stated as "easterly," and on the plat it is shown to be N. 73° E., which is a little north of east, not southeast, as stated by the land officers, it is also true that in the Mono location notice the bearing is stated to be "easterly," and in the survey it is shown to be S. 83° 30′ E. And while there is in the adverse claim of the Magnolia no formal specific allegation that this "deviation was made for the purpose of following the vein or lode," so also is there no such specific allegation in the Mono application for a patent. And yet the land officers make haste to pronounce that application perfect.

If this is a sound rule for the Magnolia adverse claim, it applies, *a fortiori*, to the Mono application for a patent; because obviously greater precision is necessary in an application, which, in the absence of opposition, is a basis for a patent, than in an adverse claim, which is not a basis for any title, but merely a ground for asking a reference of the contest for title to the tribunal indicated by law for its decision. If this rule, then, applies to the Magnolia claim, it also applies to and absolutely defeats the application for a patent.

But the rule is not sound in its application to the adverse

claim of the Magnolia claimant. It is no part of the duty of the register and receiver to try the merits of the controversy between the applicant for a patent and the adverse claimant; that is precisely what is submitted by the statute to the courts. All the register and receiver have to do when an adverse claim is made, is to stand still until the courts decide. They must, of course, determine whether that which is presented as an adverse claim is in form an adverse claim. With that determination their power and duty end. Now, in the first place, it is not even necessary that the adverse claim should embrace the location notice, or a statement of its contents, or a full copy of the survey. Neither the statutes nor the regulations require any such formality; and what the full survey of the Magnolia claim shows or fails to show on this point was not known to and did not concern the land officers. In the next place, if the location notice shows a bearing to be easterly, and the actual survey makes it N. 73° E., a little northeasterly, the question whether the direction N. 73° E. conforms to the direction of the lode or not, if material, is for the court, which adjudicates the case, and not for the land officers, who await such adjudication, to decide. The question for the land officers is whether the adverse claimants give the bearing of their claim, not whether that bearing is correct. This latter question is for the courts. But, in the third place, the question for the land officers, whatever it was, was decided by the former register in 1872, and it is incompetent for the present officers to reverse or open that decision.

The fourth and last objection stated by the land officers is in the following words:

"We also find that there are no proofs of title on file showing that the said Lafayette Granger and Farley B. Granger are the owners of said Magnolia claim."

This supposes that it is the function of these officers to *decide* whether Lafayette Granger and Farley B. Granger are owners of the Magnolia claim; for if they are not to *decide*

this question, they want no *proofs* on the point. But this is of course one of the main questions for the court to decide. The statute only requires the Grangers to *claim* the ownership before these land officers. They are to *prove* it in the courts. And they do so claim it. The statute requires that the "adverse claim shall *show* the nature, boundaries, and extent of such adverse claim." It nowhere expresses or implies a requirement that it shall *prove* the allegations on the subject. Any so-called "regulation" by the land office, requiring proof, would not be *regulation*, but legislation; and it would not only be attempted legislation by an officer who does not possess legislative power, but it would be attempted legislation hostile to that of Congress, which does possess legislative power; for the law of Congress refers to the courts this proof, of which such a regulation would give the local land officers jurisdiction. While regulation under and in conformity with the law is proper and necessary, regulation which amounts to substantive legislation is not to be tolerated, even though it do not trench upon any provision of the statute. Still more objectionable is such regulation as is not only in itself legislation, but is also in conflict with actual provisions of the statute.

Considered in the light of these evident principles of law, section 48 of the mineral regulations of June 10, 1872, cannot be said to *require* that the Grangers should, in their adverse claim, prove to the land officers that they are the owners of the claim. If there were any such requirement in these regulations, it would be void. This is the section:

"48. The adverse notice must be duly sworn to before an officer authorized to administer oaths within the land district, or before the register or receiver. It will fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, the original conveyance, or a duly certified copy thereof, should be furnished; or if the transaction was a mere verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more

witnesses, if any were present at the time; and if he claims as locator, he must file a duly certified copy of the location from the office of the proper recorder."

As has been shown, the statute only requires that the adverse claim "shall show the nature, boundaries and extent of such adverse claim." The distinction between the nature of a claim or estate and the proofs of title thereto is so broad and palpable that it can neither be overlooked nor removed. The question whether an estate claimed in lands is in its nature in fee simple, for life, for years, by tenancy at will, or by courtesy, or of some other nature, is one question. The question whether that title can be established by proof is quite another question. No man could fail to distinguish between the *nature* of the estate and the *instruments or modes of proof* of the estate. So also the question whether a mining claim is a placer claim, or a lode claim, or a tunnel right, or a water privilege, or by location or purchase, or of some other nature, is widely different from the question whether the proofs sustain the claim. The claim is one thing; the proof is another. The commissioner, therefore, is careful to say, "If the former, the original conveyance, or a duly certified copy thereof, *should* (not must) be furnished." This is directory only. If it is anything more, it is invalid. If it requires the adverse claimant to present his proofs to the land officers, it is attempted legislation, and it is at the same time in direct conflict with that valid legislation of Congress which gives jurisdiction of these proofs to the courts. In like manner, when the commissioner says that the facts connected with a verbal agreement to convey "*should* be supported by the affidavit of one or more witnesses, if any were present at the time," he proposes a regulation which is merely directory, which could not be mandatory without amounting not only to attempted legislation, but to attempted legislation directly conflicting with the valid legislation of Congress, which remits to the courts the power to hear proofs upon and decide the question of title.

Now let us see what the adverse claimants do allege on this subject:

1. They show that their claim is a *lode* claim. But they go further than that.

2. They show that the Magnolia East was located June 18, 1870, by John Houtz, Benjamin P. Brown, A. M. Paul, and W. L. Dykes; and that the Magnolia West was located June 18, 1870, by Isaac Neibauer, Ben Argyle, Jacob Ornstein, and J. L. Tibbits.

3. They allege the following conveyances:

Benjamin Argyle and Isaac Neibaur to Jacob Ornstein, January 9, 1872; James Tibbitts to Jacob Ornstein, January 22, 1872; Isaac Neibaur, James Tibbitts, Benjamin Argyle, Adam Paul, W. L. Dykes, John L. Houtz, and Jacob Ornstein to Lafayette Granger, February 6, 1872; Adam M. Paul to Lafayette Granger, February 14, 1872; Lafayette Granger to Farley B. Granger, subsequently, of one undivided half. By a clerical mistake, the conveyance from B. P. Brown to Lafayette Granger, of November 5, 1872, was omitted. The adverse claimants, therefore, not only show the nature of their claim, but they also show who were its original locators and grantors. The word conveyance implies writing

They did not present certified copies of the deeds. That they could not be required to do. And yet they intended to do that, as appears from the language of their adverse claim; and they will do it when the case shall be remanded to the local land office, where it belongs.

But neither have the Mono claimants presented any such transcripts, although their application for a patent is not, like the adverse claim of the Magnolia claimants, a mere protest, made to secure a trial, but is, in the absence of an adverse claim, the entire case, allegations and proof included, on which they claimed a decision awarding a patent. On the contrary, they have presented only *abstracts*, which are nowhere legal evidence, which nowhere take the place of certified transcripts. Mere abstracts cannot be made evidence except by express *statutory* provision. And

it would be a dangerous innovation to substitute the mining recorder's opinion of the scope of a conveyance for a certified transcript of the instrument itself. Even in the case now under consideration, while in the text of the application for the patent the conveyances are alleged to have been of undivided interests, the so-called abstracts are ambiguous, and do not show whether the interests conveyed were several or undivided. Whether by the words "abstract of title," in the 32d regulation, it was really meant to embrace certified copies of the deeds, or only to require the officer's statement of the purport and effect, it is not altogether clear. If the latter is the meaning, while it is of course proper to require this abstract, yet it is difficult to see upon what principle it can be *used as conclusive proof of title in a contested case like this.*

V.

I now proceed to a consideration of the seven "reasons" on which the Mono applicants predicate their novel motion to dismiss, as a nullity, the adverse claim of La Fayette Granger and Farley B. Granger.

The first, second, and fourth objections are based upon the erroneous view that the local land officers are to usurp the functions of the courts which are authorized by law to try the contest, and are to hear and adjudicate upon proofs of title themselves. Enough has already been said upon this point.

The third objection also has already been considered.

The fifth objection seems to involve four branches, more or less distinct: 1st, that no proceedings to determine the question of the right of possession of the property in dispute were commenced in any court, by the adverse claimants, within thirty days after the filing of their adverse claim; 2d, that the allegation, by the adverse claimants, that they commenced an action some time prior to the filing of the adverse claim, is not sufficient under the stat-

ute; 3d, that an allegation that an action of ejectment has been commenced, is insufficient under the statute; and 4th, that the proceedings referred to by the statute are proceedings to determine the right of possession, as distinct from the fact of possession.

Altogether this objection presents a very remarkable confusion of ideas. In the second and third branches it supposes that the statute requires an adverse claim, *when filed*, to contain an allegation that judicial proceedings were commenced *after it was filed.* In its whole scope it is offered as the fifth reason why the adverse claim is a nullity. That is to say, a pleading is supposed to be a nullity because something does or does not happen after it is filed. The statute does indeed provide that a failure to commence an action within thirty days shall be deemed a *waiver* of the adverse claim, but of course it does not provide that such failure shall establish the *nullity* of the adverse claim. This objection is not only out of place, as a whole, in this proceeding, which is a motion to set aside the adverse claim, as a nullity, and not a motion to enforce a waiver of the adverse claim, but it would be good for nothing, even if offered at the proper time and place. It is unsound in all its parts. To commence with the first branch, the adverse claimants allege, on the last page of their adverse claim, that they commenced an action, in ejectment, against the Mono applicants, on the 6th of December, 1872, which was nearly a month after the application was filed, and twelve days before the adverse claim was filed. This allegation was unnecessary, but it was true. And if a motion had been made on the 21st of May, 1874, to enforce a waiver of the adverse claim, on the ground that the necessary proceedings to determine the right of possession had not been commenced, and the adverse claimants had been notified of that motion, as they were not notified of the motion now pending, they would have presented a transcript of the record, which is now on file in the Commissioner's office, and which shows that the action was pending at its date, June 6, 1874. The

commencement of this action, on the 6th of December, was filed, was a substantial compliance with the statute, and would be a complete defense to a motion to enforce a waiver of the adverse claim. The following is the clause of the statute relating to the subject:

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings, in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

The object of this last clause is unmistakeable. It is to compel the adverse claimant either to commence his action promptly, or get out of the way of the applicant who seeks a patent. It is not against excessive promptness, but against excessive delay, that the provision is aimed. Every purpose within the contemplation of the statute is just as completely subserved by the commencement of the action on the first day after the application for the patent is filed as by a commencement of the action on the first, or tenth, or twentieth day after the adverse claim is filed. Indeed, the sooner the action is commenced, after the application is made, the more completely is the object of the law accomplished. The purpose of the clause is to secure the commencement of the action *before the expiration* (not after the commencement) of thirty days from the filing of the adverse claim. And its meaning is that if, at the expiration of thirty days from the filing of the adverse claim, no proceedings shall have been commenced, the adverse claim shall be waived.

In this case the adverse claimants, with a promptness which is commendable rather than reprehensible, commenced their proceedings within less than a month after the filing of the application for the patent, and a few days before they filed their own adverse claim.

The applicants, in the second branch of this objection, not only mistake the requirements of the statute respecting the presence in the adverse claim of an allegation of the

commencement of an action, but also overlook the allegation actually contained in the adverse claim, which is, not that the action was commenced at some time not designated, but that it was commenced on the 6th of December, 1872.

In the third and fourth branches it is claimed that the action of ejectment does not satisfy the requirements of section 7 of the act of May 10, 1872. But where was it ascertained that "the proceeding or action contemplated by the act of Congress is one to try and determine the right of possession as distinct from the fact of possession?" Certainly not in the act itself. The act requires that the question of the right of possession shall be adjudicated, but but it does not, either expressly or by implication, forbid the adjudication of the question of the fact of possession, or of an other facts in the same action. All it requires is that the proceeding, whatever else it may or may not embrace, *shall embrace* a determination of the right of possession. The action of ejectment answers this purpose as well as any other. It does not any the less determine the question of the right of possession between the parties, because it happens also to determine the question of the fact of the defendant's possession. It includes the particular question indicated in the statute as a part of the whole. Nor is any pretext for such a construction of the statute to be found outside of the statute itself. Courts adjudicate questions of right, not in the abstract, but in the concrete. They do not decide mere theoretical questions not connected with real facts. A mere hostile claim of two parties to the same property, whether realty or personalty, is incapable of litigation. There must be an averment of some practical invasion or threatened invasion, by one, of the right of the other, to constitute a case. A bill or declaration of John Doe against Richard Roe, alleging merely that the plaintiff is entitled to the possession of certain property claimed by the defendant, will be worthless, and will not be entertained. There must be some additional averment showing that the defendant practically interferes with that right,

not by a mere opinion entertained that he himself is entitled to the possession, but by some practical assertion of that opinion hostile to the rights of the plaintiff.

The sixth reason for pronouncing the adverse claim a nullity is that the declaration in ejectment against the applicants needs amendment. On the same principle a motion for leave to become a party complainant to a bill is to be adjudged a nullity if the bill, when filed, happens to need amendment. If this attempt to subvert the control of the courts over the amendment of pleadings, through the action of the local land officers, had been made on a motion to enforce a waiver of the adverse claim, and upon due notice to all parties, it would not have merited any serious consideration. But in the present case it is altogether frivolous.

The seventh and last objection was substantially presented in the decision of the register and receiver, and has been already considered. The Magnolia and Mono claimants both indicated *easterly* directions for their claims in their notices of location. If the former tortured theirs on the map towards the Mono claim to N. 73° E., so did the latter torture theirs on the map towards the Magnolia claim to S. 83° E. The difference between these two deviations is one not of kind, but only of degree. In view of all the circumstances attending this novel motion, under which the Mono applicants "now claim and present and urge their right" to a patent, their suggestion of fraud in this matter, on the part of the Magnolia claimants, sounds too much like "stop thief" to be either graceful or wholesome. The Magnolia claimants had no notice of the motion. A written decision was ready on the next day after the motion was made. It is difficult to understand how the register and receiver could have deemed it proper to decide so expeditiously and so secretly, a case of such magnitude, of which they had not jurisdiction; and still more difficult to understand how they could have decided all the grave questions involved, and reduced their decision to writing, in one day. Nor is it apparent how it happens

that the original motion and argument and the decision are in the same handwriting. To a stranger these circumstances might perhaps suggest a doubt whether the argument and decision were prepared as the dates of filing indicate, or previously and simultaneously; whether the counsel prepared the decision or the judge the argument. So far as the register and receiver are concerned, all this is doubtless susceptible of satisfactory explanation. But as to the Mono claimants themselves, it cannot be so easily explained. If this proceeding has been inspired on their part by an expectation, which seems to have been indulged in some quarters, at the time this motion was made, that a new era was about to be inaugurated in Utah, in which the provision of the constitution that no person shall be deprived of life, liberty, or property without due process of law, was to be suspended, and adventurers licensed to fatten on the plundered and confiscated estates of the people, the sooner the illusion is dispelled the better for all concerned. From lawless persecutions the citizens of Utah will certainly be protected by the legislative, executive, and judicial departments of the Government, and by the American people. With whatever faults they may be justly or unjustly charged, their rights of private property are precisely like the rights of other men.

H. E. PAINE,

Counsel for Magnolia Claimants.

General Land Office, Washington, D. C.

MAGNOLIA MINING COMPANY *et al.*

vs.

MONO MINING COMPANY.

REPLY TO ARGUMENT OF COUNSEL FOR MONO MINING COMPANY.

I.

The counsel for the Mono claimants insist that the pending action in ejectment, brought by the Magnolia claimants almost a month after the application for a patent was filed, and twelve days before the filing of the adverse claim, was not sufficient to save the adverse claim from a waiver under the statute; that the action to determine the right of possession must be *commenced after the adverse claim is filed.* Their argument on this point is epitomized at its commencement in the following words: "This position is not correct, for the reason that the law not only absolutely prescribes and fixes the time when the action shall be commenced in the courts, but makes it a branch and part of the proceedings instituted by the application for a patent, and it involves the identical controversy growing out of the filing of an adverse claim in the land office."

The reasons assigned for treating the pending action in ejectment as a nullity, so far as it affects the application for a patent, are, then:

1st. That "the law absolutely prescribes and fixes the time when the action shall be commenced in the courts."

2d. That the law makes the action "a branch and part of the proceedings instituted by the application for a patent."

3d. That the action "involves the identical controversy growing out of the filing of an adverse claim in the land office."

In their ingenious amplification and elaboration of this argument, the able counsel lay down the following additional and subordinate propositions, several of which are modified restatements of others:

(1) That it is evident, both from the "nature of the case" and "from the language of the act," that "the proceedings in court are merely auxiliary or subsidiary to, and not independent of, the proceedings in the land office; and are for the purpose of trying the issue raised, and settling or deciding the controversy instituted in that office between an applicant and an adverse claimant by the filing of conflicting claims to the same premises;" (2) that, "prior to the filing of an adverse claim, there is no controversy before the land office to be referred or transferred to the courts;" (3) that "the law makes the filing of the adverse claim the initiation of the controversy to be settled by the courts;" (4) that "the commencement of a suit, or a hundred suits," "not connected with that controversy," before the filing of the adverse claim, "can have no bearing or effect upon the proceedings before the land office;" (5) that "the use of the definite article (in the act) confines and limits the reference to the particular controversy before the land office, growing out of the application on the one side and the adverse claim on the other;" (6) that "the law provides, in terms, as well as in legal intendment and effect, for a transfer of that particular controversy to the courts;" (7) that "no other controversy is referred to in the act of Congress, and no other is or can be intended, or the law would have provided for the certification to the land office of the judgment roll of any and all suits pending;" (8) that the land office "is therefore confined to the controversy brought before it by the filing of an adverse claim, and to the suit in court based on that controversy, in deciding whether or not to suspend proceedings, and how long to suspend them;" (9) that no suits, except that

"which must follow the filing of an adverse claim, within thirty days, for the purpose of settling the controversy brought before the land office thereby, have any relation to, or bearing upon, the proceedings before that office, but are entirely independent thereof;" (10) that the suit brought by the Magnolia claimants constitutes no part of the proceedings before the land office; (11) that "judgment, if ever rendered therein, cannot be made a part of the record of the case before the land office, or the basis of any decision or action by it;" (12) that "the only controversy recognized by the act of Congress of May 10, 1872, is that brought before the land office by the filing of an adverse claim in due form, time, and manner;" (13) that "the only action in the courts authorized or recognized by it is a special action on the case based upon and following that controversy for the purpose of settling or deciding it;" (14) that "the law simply provides that when a formal and sufficient application, and a formal and sufficient adverse claim, covering the same premises, have been filed in the land office, in due and proper time and manner, proceedings shall be stayed, and the controversy initiated thereby transferred to the courts for settlement and decision;" (15) that a person might have a possessory right which would constitute the basis of an ejectment suit, but not the basis of such a suit as the law contemplates—the right, for instance, of a lessee of a mine ousted by his lessor; (16) that "the adverse claimants, having made their declaration in the court a part of their adverse claim, and laid a copy before you, you have a right to disregard it if you find that it is not what the law requires."

The foregoing propositions, which are stated for the most part in the language of the counsel, cover the whole reasoning in support of their claim that there has been no compliance with the statutory provision requiring the adverse claimant to bring his action in the courts to determine the question of the right of possession.

At the outset the state of facts is to be accurately recalled. The suit in question was not an old action, pending be-

tween the parties, disconnected with this controversy. It was not commenced before, but *after* the filing of the application of the Mono claimants for their patent. It was commenced twenty-four days after the filing of that application; more than two years after the filing of the Magnolia location notice (June 20, 1870;) more than one year after the filing of the original location notice of the Mono claimants, (November 24, 1871;) and twelve days before the adverse claim was filed. The action was commenced December 4, 1872. The local land officers have not recommended the issue of a patent, on the ground that the Magnolia claimants had, by a failure to bring suit in due time, waived their adverse claim. They do not intimate in their decision that there was any such waiver, or that there was any failure to bring the action in due time. What they do decide is, not that the adverse claim had been waived, but that it was in form and substance insufficient. Of course, therefore, in my former argument the question of waiver was very briefly considered. It would not have been consid ered at all, but for the circumstance that the motion of the counsel who represented the Mono claimants before the local land officers, in the proceedings in which the adverse claims were dismissed as nullities, contained the following words:

"It is not sufficient, under the law, for them to allege, as they do in their statement (adverse claim) in opposition to said application, that they had (*i. e.*, some time prior to filing their supposed adverse claim) commenced an action of ejectment against these adverse claimants. The proceedings, or action, contemplated by the act of Congress, is one to try and determine the right of possession, as distinct from the fact of possession; and such action or proceedings must in all cases, as a duty of the adverse claimant, be commenced within thirty days after filing his adverse claim."

In commenting upon this point, I presented, incidentally, in a few words on page 37, the considerations which it seemed to me would invalidate this objection, even if raised in a proceeding to enforce a waiver of the adverse

claim, instead of a proceeding to dismiss an adverse claim as a nullity.

There has been no construction of the particular clause in question, either by the Secretary of the Interior, or the Commissioner of the General Land Office, or by any other officer of the Government, or by any judicial tribunal, to which we may refer for an exposition of the intent of the legislature. But a construction has been given to similar language of another law, by the Supreme Court of the United States. The clause of the mining act now under consideration is in these words:

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same, with reasonable diligence, to a final judgment; and a failure to do so shall be a waiver of his adverse claim."

The third section of the captured and abandoned property act of March 12, 1863, contains this provision:

"And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims."

In Anderson's case, (7 Wallace, 125, 126,) the Supreme Court of the United States stated the object and effect of this latter provision in the following language:

"But the point most pressed in the argument against the right to recover in this case relates to the limitation of the law. It is contended that the claim was barred by this limitation, as it was not preferred until the 5th of June, 1868. It is therefore necessary to determine when the time for preferring claims commenced and when it ended. The words of the statute on this subject are, that any person claiming to be the owner of abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims. There is certainly nothing in the words of this provision which disables a person from preferring his claim immediately after the

proceeds of his property have reached the Treasury; and there is no good reason why a different interpretation should be given them. On the contrary, there is sufficient reason, in the nature of the legislation on this subject, apart from the letter of the law, to bring the mind to the conclusion that Congress intended to give the claimant an immediate right of action. The same motive that prompted Congress to grant the privilege to prefer a claim at all operated to allow it to be done so soon as the property had been converted into money. If, in the condition of the country, it was known that the Union men of the south, as a general thing, would be unable to prosecute their claims while the war lasted, still, it was recognized that some persons might be fortunate enough to do so; and to meet the requirements of their cases, the right to sue at once was conferred. In the progress of the war, as our armies advanced, and were able to afford protection to the Union people, it was expected that many of them, availing themselves of the opportunity, would escape into the National lines, and be thus in a condition to secure the rights conceded to them by this statute; and the history of the times informs us that this expectation was realized. To impute to Congress a design to compel these people, impoverished, as they were known to be, to wait until the war was over, before they could institute proceedings in the Court of Claims, would be inconsistent with the general spirit of the statute, and cannot be entertained. If, then, the right to prefer a claim attached as soon as the money reached the Treasury, when did it expire? * * * As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the captured and abandoned property act."

It is unnecessary to cite other statutes containing provisions similar to that now under consideration, by which the commencement of the action is limited within a designated period after some event other than the inception of the right of action. The act relating to captured and abandoned property furnishes a perfect analogy, and the

judgment of the supreme court, in Anderson's case, is decisive of the position that the words, "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings, in a court of competent jurisdiction, to determine the question of the right of possession," do not, of themselves, show that the legislative intent was to require the proceedings to be commenced after the adverse claim was filed, and not to permit them to be commenced during the interval between the filing of the application for the patent and the filing of the adverse claim; that the question, whether the legislature did or did not intend to provide that the proceedings should not be commenced *before* the adverse claim was filed is to be determined, not by the words of the act, but by the nature of the legislation, the circumstances of the case, and the general scope and spirit of the law. Upon these principles of interpretation, the Supreme Court construed the analogous provision of the captured and abandoned property act. So interpreted, the meaning of the clause in question in this case seems to me to be too obvious and clear to admit of any doubt. I cannot doubt that the commencement of the proceedings by the Magnolia claimants, twenty-four days after the application of the Mono claimants was filed, and twelve days before the adverse claim was filed, was a substantial compliance with the requirements of the statute. It was manifestly the purpose of the legislature to declare that after one claimant had filed his application for a patent, all other claimants of the same property should either promptly take measures to have the conflicting claims adjudicated or be forever foreclosed. If the adverse claimant sees fit to avail of himself of the entire sixty days of publication for the filing of his own adverse claim, he may do so. And he may, if he will, have thirty days more for the commencement of his proceedings to determine the contest between the applicant and himself. But, whether he files his adverse claim within sixty or within ten days after the filing of the application, or commences his proceedings in court within

thirty or ten days after he files his adverse claim, or during the interval between the filing of the application and the filing of the adverse claim, the rights of the applicant for the patent can by no possibility be prejudiced. Indeed, the sooner the proceedings are commenced the better for the applicant, if he acts in good faith, and has merit in his case. After he has filed his application, all his just interests demand expedition rather than delay. And it is not by any means against promptness on the part of the adverse claimant, but against unreasonable delay, that the provision of the statute is made. All just lawful interests of the applicant and all objects contemplated by the statute are as perfectly subserved by the commencement of the action even on the very first day after the application for the patent is filed, as by the commencement of the action ten, twenty, or thirty days after the adverse claim is filed. The purpose of the clause was to compel the adverse claimant to commence his proceedings *before the expiration* of thirty days from the filing of the adverse claim. It was not its purpose to secure the commencement of the proceedings after the commencement of those thirty days. Such a purpose would have been senseless and absurd. No good reason for such a requirement has been or can be given. The meaning of the statute is that if, at the expiration of thirty days from the filing of the adverse claim, the proceedings shall not have been commenced, the adverse claim shall be waived.

There was a stronger ground of principle for applying the limitation to the commencement, as well as the end of the period of time allowed for commencing the action in the captured and abandoned property act, than in the mining act of 1872. Indeed, several years before the decision of the Supreme Court in Anderson's case was rendered, three of the six judges of the Court of Claims (the chief justice dissenting and two judges not sitting) had construed the statute to require the action to be brought after the suppression of the rebellion, basing their construction on the ground that "the act contemplates

property abandoned or captured in States in insurrection and belonging to their inhabitants, and these cannot bring suits while their States are in rebellion, nor until the effect of the President's proclamation of August 16, 1861, is removed from them. We think this is the reason of the limitation in the act, and that it construes it." (1 Ct. Cl. 169.) This judgment of a divided inferior court, whatever it may have originally amounted to, was of course swept away by the unanimous decision in Anderson's case.

Instead of making the promptness of the Magnolia claimants a pretext for an attempt to bar their rights by a sheer verbal technicality, the Mono claimants ought to thank them for their commendable diligence in commencing the proceeding within less than a month after the filing of the application for the patent, and a few days before they filed their own adverse claim, when they might have lawfully postponed it for ninety days. Only the exigencies of a most desperate case could prompt the Mono claimants under such circumstances to invoke an interpretation so harsh, narrow, and unsound.

But further, the object and policy of the act of July 26, 1866, were, so far as this point is concerned, the same as the object and policy of the act of May 10, 1872, although the verbiage of the former crude act was different from that of the latter. The corresponding clause, in the act of 1866, stood in these words: "Whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases." It being settled, by the decision of the Supreme Court in Anderson's case, that the *words* of the statute of 1872 do not require the proceeding to be commenced after the adverse claim, but the intent of Congress, on this point, is to be determined by the nature and circumstances of the case, and the general spirit and scope of the statute, cases un-

der the acts of 1866 and 1872 stand on precisely the same footing, so far as this point is concerned. That is to say, if the act of 1872, by its general scope and object, under the circumstances of the case, requires the proceedings to try the right of possession to be commenced after the adverse claim is filed, so also does the act of 1866, for the same reason, require the same thing. For while it is true that the words of the act of 1866 do not require this, it is also equally true that under the ruling of the Supreme Court, in Anderson's case, the *words* of the act of 1872 do not require it. So far as this point is concerned, then, a case arising under the act of 1866 would not be without weight as a precedent for the present case.

The case of the "Bullion Mining Company *v.* 420 Mining Company," decided by the commissioner, August 19, 1873, was such a case. The Bullion Company filed their application for a patent on the 6th of November, 1867, and the adverse claim of the 420 Company was filed, in due time, within thirty days thereafter. The only proceeding ever commenced in the courts to determine the right of possession, between these parties, up to November 29, 1872, (a date more than five years subsequent to the filing of the application for the patent,) was an action commenced, *not by the adverse claimants*, but by the applicants themselves against the adverse claimants, on the 16th day of November, 1865, two years before the filing of the application for the patent by the Bullion Company. After this action had been pending several years, the Bullion Company discontinued it, and the adverse claimants, the 420 Company, on the 29th of November, 1872, commenced suit against the Bullion Company. But the commissioner decided that this was sufficient to entitle the 420 Company to an adjudication in the courts, before a patent should issue on the application of the Bullion Company. (Copp, 221.) This authority, so far as it goes, is favorable to the Magnolia Mining Company in the present case.

The reason why actions cannot be commenced, under

ordinary modern statutes of limitation, until the period of limitation begins, is that these statutes usually fix a certain limitation *from the time when the cause of action accrues.* Of course the action cannot be commenced before the cause of action accrues. And it is this circumstance, and not the language of the act, which prevents the commencement of the action before the period begins, as well as after it expires. For example, the modern statute of limitation usually follows this form:

"No person shall commence an action for the recovery of any lands, unless within (say twenty) years after the right to bring such action first accrued."

Under a statute so worded, obviously an action cannot be commenced *before* the twenty years begin to run, or *after* they end. But the reason why it cannot be commenced before the term begins, is altogether different from the reason why it cannot be commenced after the term ends. It is the prohibition of the statute which cuts off an action after the term ends. But it is the nature of the case, the want of a cause of action, which cuts it off before the term begins. In ancient statutes of limitation the phraseology was often different. For illustration, the statute 32 Henry VIII, chapter 2, enacted A. D. 1540, contains this provision:

"No person or persons shall sue, have, or maintaine any action for any manors, lands, tenements, or other hereditaments, of, or upon, his, or their, own seizin above 30 years next before the teste of the originall of the same writ to be brought," &c.

In this statute the period is measured backward from the commencement of the action to the time when the right of action accrued, and if it exceeds thirty years the action cannot be commenced. In the ordinary statute, the period is measured forward from the time when the cause of action accrued to the commencement of the action, and if it exceeds the period prescribed, the action cannot be brought. And yet, so far as the question when the time within which the action may be brought begins is con-

cerned, the effect of both forms of enactment is the same. In neither case can the action be commenced *before* the cause of action accrues. In both cases it may be brought *as soon as* the cause of action accrues. In neither case does the language of the statute determine when the action may *first* be commenced, but in both cases that is determined by the nature and circumstances of the case.

The statute of limitations of 21 James I, chapter 16, enacted in 1623, contained this provision:

"And that no person, or persons, that now hath any right or title of entry into any manors, lands, tenements, or hereditaments, now held from him or them, shall thereinto enter but within 20 years after the end of this present session of parliament."

The construction insisted upon by the counsel for the Mono Company would have interdicted all such proceedings during the interval between the taking effect of the act and the end of the session of Parliament, if any such interval had occurred.

The foregoing considerations dispose of the first proposition of the counsel for the Mono claimants, so far as it touches the point now before us. That is to say, they show that neither the words nor the general scope and spirit of the act warrant the pretense that the proceedings commenced by the Magnolia claimants twenty-four days after the application for the patent was filed, and twelve days before the adverse claim was filed, were not in substantial conformity with the requirements of the statute.

But the counsel for the Mono claimants think that aside from the *words* in question, they find, in concomitant provisions of the statute, proof that the legislature intended absolutely to require the action to be commenced after the filing of the adverse claim. This is stated generally, in the 2d and 3d propositions of their argument, in these words:

2d. That the law makes the action "a branch and part of the proceedings instituted by the application for a patent."

3d. That the action "involves the identical controversy

growing out of the filing of an adverse claim in the land office."

Now, these two points amount to this, if they amount to anything material to the question under consideration, that the statute means that the identical formal issues, originated by the filing of the application for the patent and the adverse claim, shall be sent to the courts for adjudication; that this adjudication is a part of the proceedings for the issue of a patent, and that, inasmuch as these issues cannot be sent to the courts until made up by the filing of the adverse claim, Congress must have intended that the proceedings in the courts should commence after the adverse claim was filed.

It would be hard to conceive of a more radical misconception of this statute. While it is true and very manifest that the issues which are substantially exhibited in the application and adverse claim, virtually constitute the controversy which is to be adjudicated by the court, it is manifestly not true that these documents originate the precise formal issues which are to be sent to the court. The controversy to be tried in the courts originates with the antagonistic location notices, and in the present case, instead of originating with the application and adverse claim, it originated more than a year before the application was filed, when the Mono Company, on the 24th day of November, 1871, attempted a location of this mine hostile to that made by the Magnolia Company, on the 20th of June, 1870. The controversy to be decided by the courts is shown, but not originated by the application and adverse claim. Nothing could have been further from the intention of Congress than to require the parties by the application and adverse claim to frame specific issues for trial in a special form of action in the courts. Is it supposed that Congress deliberately attempted to do that which it had no constitutional power to do? Who authorized Congress to prescribe issues and forms of action for State courts, to send formal issues from federal tribunals to State tribunals for adjudication in prescribed forms, and to make

such adjudication by the State tribunals a part and parcel of the proceedings of the federal tribunals? Who authorized Congress to send particular formal issues, made by the application and adverse claim, from the land office to a State court, and to make the adjudication of those issues, in a prescribed form of action, a branch and part of the proceedings of the land office? The "court of competent jurisdiction" indicated in the statute, if the mine were situated in a Territory, would, of course, be a territorial court, and therefore subject to federal control. But if the mine happens to be in a State, the court of competent jurisdiction may be, and in fact almost always is, a State court, over whose forms and modes of procedure and practice Congress has no more control than a foreign legislature.

It might be competent for the legislature of the State of Texas, which has a land system independent of the Federal Government, and at once controls the State land office and the State courts, to provide by statute that a particular issue raised in a specific form in the State land office should be remitted to and tried by the courts as a part of the land office proceedings. It would be competent for the State legislature, in the absence of any interdiction by the State constitution, to mould the action in any form, and give it any name, at its discretion. For its jurisdiction covers the whole ground. But for one sovereignty to attempt so to invade the tribunals of another is wholly out of the question. It is wild to assert that Congress intended any such thing. There is not the slightest evidence of any such folly. The proceeding in the court is not a branch or part of the proceedings before the land office, in any such sense as that intended by the counsel; in any such sense that, chronologically, the functions of the court must *commence* when those of the land office are, by the filing of the adverse claim, *suspended.* It would be no more erroneous or illogical to assert that, when a record of a foreign judgment *in rem* is introduced, and disposes of an action in one of our courts, the foreign adjudication is a part of the pro-

ceedings in our own court. It is true that the result of the adjudication of the courts is to be accepted by the land office as decisive of the case before it, just as the result of the foreign adjudication of an action *in rem* is accepted as decisive in our courts. But no more in one case than in the other is one proceeding a consecutive integral part of the other. It might, with the same propriety, be pretended that, because the recognition of a particular State government by the political branch of the Federal Govment, becomes a rule of decision for the judiciary, in a given case, therefore the action of Congress in the premises is a branch and part of the case in court. Indeed, it might as well be said of every judgment and decree heretofore or hereafter rendered, that the case in which it is pronounced is a branch and part of all proceedings which it happens to affect.

Of course the counsel are not practicing the artifice of arguing or assuming the truth of a proposition in one sense, and then applying and using it in another. When they assert, in the 3d proposition, that the action "involves the identical controversy growing out of the filing of an adverse claim in the land office," I understand them to mean that it consists of the specific formal issues raised by the application and adverse claim, and not merely that it consists of the same issues which are substantially shown in those documents. If the latter is their meaning, of course it is correct; but it also wholly destroys their argument. If the former is in the meaning, then, as I have already shown, it is wholly erroneous.

The subsidiary points or propositions made by the counsel will now be considered. To a great extent they are modified statements of those already examined. The first of them has already been answered. The second, which is the assertion that, "prior to the filing of an adverse claim, there is no controversy before the land office to be referred or transferred to the courts"—whatever meaning shall be attached to its ambiguous phraseology—has also been considered. Only a few words will be added.

If it is only meant that, prior to the filing of the adverse claim, there was before the land office no such technical dispute as consists of an application for a patent on one side, and an adverse claim on the other, of course the assertion is true; but it is a mere frivolous play upon words. If, however, the meaning is that, prior to the filing of the adverse claim, the controversy, which the law submits to the courts, does not exist, the assertion is palpably erroneous. Whether it was or was not technically before the land office is wholly immaterial. No provision of the law, expressly or by implication, required it to be before the land office. In the case of the "Bullion Mining Company *v.* 420 Mining Company," the controversy had been pending in the court two years before either the adverse claim or the application itself was filed. The third point is covered by the considerations already suggested.

In the sense in which it is true, the fourth proposition is altogether immaterial. In the sense in which it would be material, it is not true. It is true that the commencement of a hundred suits not connected with the controversy, which is or should be substantially shown by the application and adverse claim, would not answer the requirements of the law. But the suit pending between the Magnolia and Mono companies *is* connected with the controversy shown by the application and adverse claim. It is, in substance, the identical controversy shown by those documents. But it is not true that the commencement of the suit can only be valid to affect the proceedings in the land office when the suit involves, in a particular form of action, specific issues formally originated by the application and adverse claim. And yet this latter proposition is the proposition which must be true to be of any avail to the argument of the counsel for the Mono claimants.

The counsel is mistaken as to the significance of the use of the definite article in the clause under consideration. An examination of the last sentence of section 6 and the first two sentences of section 7 shows this at once. Who

says that "the controversy" is a controversy originated by the application and adverse claim, and not the controversy which originated in the hostile location claims? It is the counsel, and not the legislature. Nothing in the act, expressly or by implication, authorizes any such assumption. The employment of the definite article "the" does signify that the adjudication must cover *the* controversy, respecting the right of possession of the property in question, growing of hostile location claims, and not *a* controversy of a different origin or character. But it does not signify that only specific issues, formally raised by the application and adverse claim, are to be adjudicated.

All the statements, from the sixth to the thirteenth, inclusive, being statements, in other forms, of propositions already considered, it is unnecessary to say anything further in reply to them. But in view of the language and spirit of the law, and of the relations between the federal legislature and the State courts, the assertion that "the only action in the courts authorized or recognized by this law is a special action on the case, based upon and following a controversy raised by the application and adverse claim," must certainly be deemed a courageous assertion. In connection with this, I beg leave to refer to page 38 of my former argument.

The fourteenth proposition has also, of course, been answered. It is not true that the statute provides that "the proceedings shall be stayed, and the controversy *initiated* thereby (*i. e.*, by filing the application and adverse claim) transferred to the courts." The statute provides that "all proceedings, except publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the claim waived." It does not provide for or contemplate a "*transfer*" of *anything* from a federal land office to a State or territorial court. Still less does it provide for *transferring* a controversy formally initiated in the land office. It stays proceedings in the land office until proceedings which may be had in a State court,

over which Congress has no more control than a foreign prince, settle the possessory rights of the parties under State and territorial laws and miners' rules and regulations. And the controversy so settled is not one *initiated* by the filing of the application and adverse claim, but it is one initiated by the filing of the location claims of the parties, and substantially exhibited, but not created, by the application and adverse claim.

The drift of the fifteenth and sixteenth propositions is to show, not that the suit was commenced too soon, but that it was not of the right kind. It is to be observed incidentally that, as the local land officers did not decide that the action was commenced too soon, so also did they not decide that the action was not of the right kind. Now, to what I have said on this subject, on pages 38 and 39 of my former argument, I will only add that the man who can read the application and adverse claim and the original and amended complaints and answer, in the pending ejectment suit, and doubt that the controversy now pending before the Utah court is the same controversy which originated in the conflicting location notices of the parties, and is shown by the application and adverse claim, while he may make a capital advocate, would certainly make a very poor judge.

II.

But the counsel for the Mono applicants further insist that the adverse claim under consideration is informal and insufficient, for two reasons:

1st. "Because it does not show the nature of the claim, or that the adverse claimants have any right thereto."

2d. Because "the parties claim by purchase, and do not show or prove the citizenship, either of the original locators, or the parties to the several alleged mesne conveyances through which they claim to have derived their title."

In support of the first of these objections, the counsel reason as follows: that the language of the law requires the adverse claimant not merely to *allege*, but to *show*, the

nature of his claim; that while this showing need not amount to *conclusive* proof it must amount to *ex parte* proof that the adverse claim is superior or paramount to the claim of the applicant; and that the regulations of the land office requiring an abstract of title to be filed as such *ex parte* proof, have the force of law.

Not only is the proposition, that the adverse claim is informal and insufficient, "because it does not show the nature of the claim, or that the adverse claimants have any right thereto," erroneous, but all the reasoning offered in its support is, in all its parts, from beginning to end, vicious and unsound. In the first place, the notion that the language of the statute requires the adverse claimant to prove the nature of his claim, involves a twofold error, a compound fracture, of law and logic. The statute does not require the *adverse claimant* to show the nature of his claim. It requires the *adverse claim* to show the nature of the claim. And it also requires this adverse claim to be upon the oath of the claimant. The precise words of the clause are these:

"SEC. 7. That when an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim."

This language excludes the idea that the certificates of officers shall be a part and parcel of the adverse claim. The adverse claimant swears to the adverse claim, but not to the certificates of local officers. Inasmuch, then, as it is the *adverse claim* which is to *show* the nature of the claim, and this adverse claim consists of the sworn statement of the adverse claimant and not of the certificates of somebody else, the attempt to foist into the adverse claim something which the law does not place there is altogether vain.

But, furthermore, the word "show" here means not *prove*, but *allege* as it ordinarily does in pleadings both at law and in equity. It means averment in the adverse claim, upon the oath of the adverse claimant, and not proof by

outside certificates. The word "show" may, indeed, mean *prove*, but it may also mean *allege*, *aver*, *set forth*. In view of the fact that the statute provides for no showing on this subject, except that in the adverse claim, which is upon the oath of the adverse claimant, it is as unreasonable to say that this showing must consist of proof from third persons, as it would be to assert that the words, "your orator further showeth," in the ordinary chancery bill, signify not that the pleader alleges, but that he proves by evidence *ab extra*, the facts set forth.

In the next place, the assertion that while the showing need not amount to conclusive proof, it must amount to *ex parte* proof, involves as radical a misconception of the nature of evidence as of the provision of the clause now under consideration. In evidence, the distinction is not between conclusive and *ex parte*, but between conclusive and *prima facie*, or presumptive evidence. Evidence taken on notice may be *prima facie* or presumptive, and evidence taken *ex parte* may be conclusive. If, under a statute, a proceeding is had wholly upon affidavits and counter affidavits, of course *ex parte* evidence, being the only evidence in the case, must be conclusive. But whether the testimony of a witness, examined and cross-examined on the stand in court, is *prima facie* or conclusive, depends on the other testimony in the case. Furthermore, the adverse claim which, and which alone, is required to show the title, and is to be sworn to by the adverse claimant, is the precise showing, and the precise *prima facie* and *ex parte* proof, which the statute provides. This affidavit, or sworn statement, is *ex parte*, and under the statute it is made *prima facie* proof. It is the *prima facie* proof called for, and all the *prima facie* proof called for. If the legislature had not intended this as a *prima facie*, *ex parte* showing of title, it would not have required it to be made on the oath of the adverse claimant. If it had required anything else besides the adverse claim to *show* the title, (as, for example, the certificates of local officers,) it would have given,

somewhere in the statute, some intimation of such a requirement.

In the third place, the assertion that the regulation of the land office requiring the adverse claimant to file an abstract of title, or an original conveyance, or a duly certified copy thereof, with the adverse claim, has the force of law, is altogether erroneous. Whatever the statute requires to be shown is to be shown by the adverse claim itself, on oath of the adverse claimant, and not by something else outside of the adverse claim. And that the commissioner cannot amend the law by an order, cannot legislate by regulation, is not only too clear on the face of the case to admit of argument, but has been expressly decided by the Secretary of the Interior, who, in the case of the "Jenny Lind Mining Company *v.* Eureka Mining Company," held that these regulations *have not the force* of law. The commissioner, in rejecting the Jenny Lind adverse claim, March 23, 1873, had expressed his view in these words:

"This (Jenny Lind) adverse claim is, in the main, made out in the form prescribed by law, and by the instructions from this office, although no abstract of title is on file from the office of the proper recorder, tracing the title from the original locators to the Jenny Lind Mining Company." (Copp. 168.)

There were other adverse claims in the case, including the "May Henrietta" and the "King David." The Jenny Lind Company appealed from the commissioner's decision rejecting their adverse claim. But they also objected to the "May Henrietta" and "King David" adverse claims, which had been, with their own, rejected by the commissioner, placing their objection upon the ground that those adverse claims were sworn to, not by the adverse claimants themselves, but by an attorney. The Secretary, on the 24th November, 1873, enclosed to the commissioner two opinions of the Assistant Attorney General in the case, dated respectively September 30, 1873, and November 22, 1873, announcing his concurrence in the conclusions there-

in reached, and, in accordance therewith, overruling the rejection of the Jenny Lind adverse claim, but sustaining the rejection of the May Henrietta and King David adverse claims, on the ground that those two adverse claims were sworn to, not by the adverse claimants themselves, but by their attorney. (Copp., 169.)

The opinion of September 30, 1873, contains the following words:

"The regulations issued by the commissioner, it is true, require that there shall be such a plat and field-notes, *but that they do not have the force of law*, and were never intended to operate as a bar where an applicant, in good faith, has done all in his power to comply with them. *And so with reference to the abstract of title.* It is convenient to have such abstract, for the purpose of showing how the claimant derives title, and therefore the adoption of the rule by the commissioner. *If the adverse claimants properly allege that they are the owners of the claim, that is good pleading, and sufficient to notify the applicant for patent of what is claimed. I think that an omission to file this abstract should be treated as an irregularity merely, and not as a defect that vitiates the adverse claim. No one is injured by the omission, and it would be extremely technical to treat it as good cause for rejecting the claim.*" (Copp., 173.)

This opinion also contains these words:

"Some other objections are made, which prevent the question whether the adverse claimants are required to show affirmatively that they have complied with all the local usages and customs. I think they are not. If they have failed to comply with such usages, and a forfeiture is denounced for such failure, that is a matter of defense." (Copp., 174.)

The opinion of November 22, 1873, contains the following:

"The Eureka Company objects to each of the following adverse claims, to wit: The May Henrietta lode, the Excelsior lode, and the King David lode, for the reason that they were severally sworn to by D. Cooper, as attorney, instead of by the persons, or some of them, who are alleged to be the owners thereof. The parties owning these lodes are incorporated companies. The seventh section of the

act of May 10, 1872, provides: 'That where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same.' It does not provide that it may be upon the oath of an agent or attorney. Without statutory authority an attorney cannot make the oath for his client. I find myself obliged to advise that the above-named adverse claims were not properly verified, and for that reason should be rejected." (Copp., 175, 176.)

It is hardly necessary to add that the law of the land office on this subject is now too clear to be misunderstood.

The second ground on which the counsel for the Mono Company base their position that the Magnolia adverse claim is informal and insufficient, is, perhaps, the most remarkable position of their whole argument. These are their precise words:

"But the adverse claim is informal and insufficient for another reason. The parties claim by purchase, and do not show or prove the citizenship either of the original locators or the parties to the several alleged mesne conveyances, through which they claim to have derived their title. This defect is fatal, under the ruling of the department in the celebrated New Idria case, rendered August 4, 1871."

Is it possible that the Commissioner is expected so thoroughly to misunderstand the nature of an adverse claim and the ruling in the New Idria case as to suppose that this proof of citizenship must be a part of the adverse claim, or that the department has ever made any such decision?

To begin with the decision referred to, the case before the department was the *application* of the New Idria Company for a patent. The question was, not on the sufficiency of an adverse claim, but on the final issue of the patent by the Government to the applicants themselves. Most properly the department decided that without proof of citizenship the New Idria Company could not have their patent. Furthermore, the question pertained, not to the *form* of the application, but to the *proof* on the hear-

ing. The decision was not that the application was informal and insufficient for want of proof of citizenship, but that the patent could not be granted without such proof. The time to suggest an application of this decision to the Magnolia Company will be when, after a favorable adjudication by the courts, they come to the land office with their judgment roll and ask for the patent. Then, and not till then, will they be called on for the affidavits of citizenship provided for by section 7 of the mining act of 1872. But even if it had, in fact, been decided in the New Idria case that the original *application* for a patent is informal and insufficient, unless affidavits of citizenship shall constitute a part of or accompany the application, it would not follow that an adverse claim would be informal and insufficient without such affidavits. For the adverse claim is a mere protest. The same fullness, completeness, and precision are not required in the adverse claim as in the application itself, as was shown on pages 24 and 25 of my former argument. Therefore the New Idria decision, even if it had been in that form, would not be a rule for the adverse claim now in question. And yet there would have been some plausibility in the argument. But what shall be said of reasoning which would take a decision that an applicant for a patent must, before he receives his patent, show by affidavits his citizenship, (not aver it in the application itself,) and would make that decisive of the position that an adverse claim is informal and insufficient unless it embraces such affidavits of citizenship.

Now, shall the Mono claimants use against others an argument which is fatal to themselves? If the New Idria decision makes proof of citizenship essential to the application for a patent, their own application is informal and insufficient. For their affidavits of citizenship, excepting those of Gisborn and W. E. Miller, were not only not filed with the application, but were never filed in the local land office at all. They were filed, six in number, by counsel, in the General Land Office, *July* 10, 1874, *several days after my former argument was filed in the case.* They were, in

fact, not made until June, 1874. It is true that the original application contained an averment of citizenship; but that averment was not *required* by the statute to be embraced either in the application or adverse claim. The seventh section of the act of May 10, 1872, does not require citizenship, like the nature of the adverse claim, to be averred or shown, but requires proof of the same. And the commissioner, in the first section of his circular of September 7, 1871, which *contains five provisions for applicants, and not one for adverse claimants*, requires as *proof* of citizenship an *affidavit from each claimant.* (Copp, 267.)

This branch of the attack, therefore, is but a repetition of the old story of the "good, honest citizen," who, before he "swears the law on" his neighbor for counterfeiting, finds it prudent to dodge into a dark alley and empty his own pockets of counterfeit coin. So far as proof of citizenship is concerned, it certainly would be a sweet-scented administration of land office justice to allow the Mono claimants to cast stones at their Magnolia competitors.

III.

The next point of the counsel is, that the question of the formal sufficiency of the adverse claim is not *res judicata*, because the adverse claim has been waived. I think that no one except the counsel themselves, will ever, upon full examination of the case, conclude that the adverse claim has been waived. But suppose it had been waived. The local land officers did not decide that it had been waived. They decided that it was insufficient, reversing a previous decision of the same question by the same office. If the local land officers had, in their last proceedings, decided that the adverse claim had been waived, the question so decided would not have been *res judicata.* But when they decided that it was formally insufficient, they did decide a question which had already been settled. The original formal sufficiency of the adverse claim was not affected by any subsequent waiver, one way or the other. The mistake of the counsel in this re-

gard "is so plain that extended discussion of the point is not necessary." But then, if the adverse claim has been waived, the question of its original character of course ceases to be important.

The counsel also think that, inasmuch as the adverse claim was in their opinion virtually waived, the adverse claimant was not entitled to notice of the proceedings in which it was adjudged to have been (not waived, but) originally informal and insufficient. To state this proposition is to refute it.

IV.

The counsel insist that the Mono location is sufficient, both upon principle and under the authorities, to entitle the Mono applicants to a patent on the application now before the Commissioner. This is their precise language:

"We do not dissent from the position assumed by the attorney, that one person could not take, by location, more than two hundred feet on a lode or vein, or that seven persons could not take more than fourteen hundred feet; but we deny his proposition that the whole location was invalid and void because the parties included two hundred feet more in their location than they were entitled to, and contend that the location was good and valid to the extent of fourteen hundred feet, the amount they were entitled to take."

That is to say, they think that if a joint location of 1,600 feet by seven claimants, in seven undivided shares, is not valid, either for the whole of the 1,600 feet, or for seven undivided eighths of the 1,600 feet, it is nevertheless valid for the whole of 1,400 feet; that thereafter an eighth party, by locating an *undivided* share, as W. E. Miller did, in the same 1,600 feet, acquires all of the 1,600 feet which was not acquired by the first locators, viz, the whole of the remaining 200 feet; that the Commissioner can thereupon, by patching together the 1,400 feet, in which the last locator has no interest, and the 200 feet in which the first locators have no interest, on one application made by all

the parties jointly, issue a patent for the whole 1,600 feet in undivided shares to the eight locators or their representatives. And, of course, upon the same principle, they would claim that five persons, by locating five undivided shares in 1,600 feet, acquire the whole of 1,000 feet, so that three other claimants may, by subsequently locating three undivided shares in the same 1,600 feet, acquire the whole of the remaining 600 feet, and then the eight locators may patch their two claims together, and upon one joint application obtain a patent for eight undivided shares of the whole; and on the same principle would also claim that one person may, by a location of 1,600 feet, acquire the whole of 200 feet, so that seven other claimants may, by a subsequent location of seven undivided shares in the same 1,600 feet, acquire the whole of the remaining 1,400 feet; and the eight locators may unite their two claims in a common application, and demand thereon a patent for eight undivided shares in each and all of the 1,600 feet.

This theory of the counsel, respecting the Mono locations, involves the following aggregation of errors:

(1) That seven men, by a futile location of the whole of 1,600 feet in undivided shares, took the whole of 1,400 feet in undivided shares.

(2) That the eighth man, W. E. Miller, by an equally futile location of an *undivided* eighth part of the same 1,600 feet, took the whole of the 200 feet not taken by the others.

(3) That these two distinct parcels, through some necromancy, subsequently became so metamorphosed that the eighth man exchanged his separate right to the whole of the 200 feet, for a common and undivided interest in the whole 1,600 feet.

(4) That the seven men, by some similar hocus pocus, acquired undivided interests in common with the seventh man in the whole 1,600 feet, in lieu of their right to the whole of the 1,400 feet.

(5) That, to suit this emergency, the mining system is to be so stretched and twisted that two parcels—so sought

in common, but caught in severalty—may be mixed up in hotch pot in the application for a patent; and—

(6) That the land department will plaster over these absurd illegalities with a patent which will conceal, if it does not cure them.

To save the locations, the undivided interests are to be severed, and then, to save the application for a patent, they are to be spliced together. But this *Mono*-mania for disintegration, redintegration, and transmogrification cannot be humored. The law and logic are as bad as they would be if two "poor but honest" butchers, having negotiated for undivided shares in one hog, and found their negotiations failures, should pretend, nevertheless, to the acquisition of separate estates in the head and tail, and thereupon, instead of asking for separate bills of sale of the head and tail, should boldly demand an undivided conveyance of "the whole hog." The counsel believe this position too manifestly sound to require any argument. I consider it too unsound to require any argument on the principle involved additional to that heretofore submitted.

So far as the authorities are concerned, the counsel seem to me to be equally mistaken. I believe that their position has never been adopted in any ruling of the land office; that there never was a case in which two such locations were united in one application, and, even in the absence of adverse claims, patented in undivided shares to both sets of claimants on such application. I believe that neither the Secretary nor Commissioner ever sanctioned any such administrative legislation as that would amount to. Indeed I am not sure that there ever was a case where the first set of locators (there being no second locators) were permitted to take a patent for undivided shares in a reduced area, upon an unamended application for the whole area, even in the absence of adverse claims. That the department would permit such first and sole locators to take such reduced amount, upon locations made *de novo*, in the absence of adverse claims, I have no doubt. That it might be permitted in clear cases, in the absence of adverse

claims, upon amended application, and new publication, is possible. But that two sets of such claimants, so locating two severalties, will ever be permitted to join their irregularly-acquired severalties in one common application, and on that application, without either new location, amended application, or new publication, obtain a patent of undivided shares in the whole of both parts, in the presence and against the protest of adverse claimants, I cannot believe. Let us examine the decisions which the counsel think make their position so clear as to require only to be stated.

In the case of the San Augustin Mining Company, claiming 3,000 feet, it was decided, on the 22d of September, 1870, that under the act of July 26, 1866, and the territorial law fixing the maximum of a company location at 1,500 feet, "no company location can exceed 1,500 linear feet along the course of the vein or lode; and such location cannot, in any case, be made at a rate exceeding 200 feet to each member of the company, (except one of them is the discoverer, to whom 200 feet additional are allowed,) *and to allow a company to locate (since the passage of said act of Congress) such quantity as would exceed* 200 *feet to each member, other than the discoverer, would be illegal and void.*" (Copp, 34.) In that case the attempt by the San Augustin Company to locate 3,000 feet in undivided shares was not followed by an attempt of others to locate undivided shares in the same 3,000 feet, or by an attempted consolidation in one application of interests so acquired in severalty with a demand for a patent of undivided interests in the whole to both sets of claimants. And yet, even in that case, the location was held illegal and void. Obviously there is in the case no authority for the claim that the original and subsequent irregular locations of the Mono Company secured to the first locators the whole 1,400 feet nearest to the discovery hole, and to the subsequent locator the whole of 200 feet more, and entitled them altogether to a patent in undivided shares of the whole of the 1,600 feet on a joint application of all the parties.

The case of the San Xavier mine was decided by the

commissioner, July 10, 1873. (Copp, 210.) In that case five persons located 3,600 feet, undivided, after the passage of the act of July 26, 1866. It was not an attempt to claim the entirety of 1,000 feet, and to supplement the location by causing thirteen other persons to locate undivided shares in the same 3,600 feet, so as to acquire the entirety of the remaining 1,600 feet, and by uniting these two integral parts to make an undivided whole of 3,600 feet, for which a single joint application could be made, as the basis of one patent. There were no subsequent "*undivided*" locators, or, so far as the decision shows, any other claimants of any kind. The decision of the commissioner was in these words:

"There was, then, on the eleventh September, 1866, no authority of law for the location of thirty-six hundred feet of a lode by five persons, twelve hundred feet being the greatest extent then subject to location by five persons, provided they were the discoverers, or one thousand feet if claimed simply as locators; and *this office is accordingly unable to issue a patent upon said application as it now stands*, being for three thousand feet on the Xavier mine."

This virtually required the application to be changed. The claimants were notified that they could take 1,200 feet, *but the plat and field-notes would have to be amended accordingly*. In this case, therefore, the Commissioner required that the application and the plat and field-notes should be amended before the patent would be issued. He also gave an option of relocations under the act of 1872. It is hardly necessary to suggest that the case of the Mono claimants finds no support in this decision.

So the case of the Gus Belmont mine, decided August 14, 1873, (Copp. 216,) in which there were only one set of locators, who claimed 3,000 feet, and were only entitled to 1,000 feet, was sent back by the Commissioner, and a new survey ordered.

Nor has any decision ever been made in homestead or pre-emption cases which, by any possible ingenuity, can be tortured into an authority for the present Mono claim of a patent for the whole of 1,600 feet on the application now

before the Commissioner. What difference does it make with the present case whether the Department will or will not grant a patent in a homestead or pre-emption case, for a diminished quantity of land, without an amendment of the entry, even if that is true? Will it be pretended that there ever was a homestead or pre-emption case in which seven persons, having a right to locate a certain quantity of land in undivided shares, attempted to locate a greater quantity in undivided shares, and subsequently an eighth person attempted to locate an undivided share in the same land, and then, on the pretense that the first seven locators *acquired* the entirety of seven-eighths of the land, and the eighth locator acquired the remaining eighth separate and entire, the Land Department granted a joint patent on a joint application for the whole? Certainly not. How is it material, then, to cite the practice of the land office in homestead and pre-emption cases, where such company locations are unheard of, any more than it would be to cite the practice of the Internal Revenue Bureau in whiskey or tobacco cases?

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MAGNOLIA MINING COMPANY *et al.*
vs.
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REPLY TO ADDITIONAL ARGUMENT OF COUNSEL FOR MONO MINING COMPANY.

The additional argument for the Mono claimants is mainly based upon the opinion that the district court of Utah either has no jurisdiction at all of proceedings to determine the question of the right of possession of mining property, except by virtue of section 7 of the act of May 10, 1872, or has no jurisdiction of *such proceedings as are mentioned in section* 7, except by virtue of the provisions of that section. This opinion, whichever form it takes, is wholly erroneous. Section 7 recognizes, but does not confer, jurisdiction. Independently of that section, the court has jurisdiction of every question which can possibly be involved in the proceedings to determine the right of possession therein mentioned. And such jurisdiction does not begin with the filing of the adverse claim, or with the filing of the application for a patent, but it vests from the incipiency of a conflict between possessory claims under the mining laws. By the first section of the act of July 26, 1866, these possessory rights were subjected to local laws, customs, and rules, not in conflict with the laws of the United States. By section 5 of the same act it is provided—

"That as a further condition of sale, in the absence of

necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent."

These provisions involved a concession of jurisdiction to the local courts, by whom such laws are administered.

This jurisdiction is *recognized* in section 6 by a provision—

"That whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, *in the courts of competent jurisdiction*, of the rights of possession to such claim, when a patent may issue as in other cases."

And it is recognized in section 9 by this provision:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the *local customs, laws, and the decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage *shall be liable to the party injured for such injury or damage.*"

By the first, third, and fifth sections of the act of May 10, 1872, the concession is renewed or recognized anew. And the jurisdiction is recognized, although not granted, by the clause of section 7 relating to the prosecution of "proceedings to determine the question of the right of possession."

But, if there could possibly be any lack of jurisdiction in the premises in a State court, there can be none in the district court of Utah, which is a Territorial court established by the United States, and, under the statutes, combines with the function of administering the local laws

two other functions which a State court does not exercise, viz, the administration of laws of the United States locally applicable to Utah under section 3, article 4, of the Constitution, and also the precise jurisdiction conferred by statute under the Constitution upon the district courts of the United States. The judicial administration of this court therefore covers the whole ground of federal and local legislation and constitutional provision.

It would be difficult to conceive more radical misconceptions of the law of this case than those which are involved in the following propositions of counsel:

"Before that relation is established by an application on one side and an adverse claim on the other, made and filed in the time, form, and manner prescribed by the act of May 10, 1872, the Government takes no notice whatever of controversies arising between parties claiming mines, and neither the court, nor any officer nor tribunal of the Government, are authorized or empowered to exercise jurisdiction over them or to decide or settle them." (P. 2.)

"After an application is made and an adverse claim filed, the controversy involves not merely the right of possession or occupancy, but the right to a patent, and the judgment (rendered on a suit commenced thereafter) when certified to the land office entitles the successful party not merely to the possession of the claim, but to a patent from the Government. This controversy as to the right to a patent cannot arise before the filing of the application and the adverse claim in the land office, as that is the mode and the only mode provided by law for its initiation. It is this controversy thus initiated, and this only, which Congress authorizes the courts to take jurisdiction of and settle by judgment." (Pp. 3, 4.)

"The only judgment the land office can consider is a judgment in a suit commenced after the filing of the application and an adverse claim, to ascertain and determine which party has the better right under the mining laws to a patent to the ground adversely claimed. This can only be shown by the application and the adverse claim." (P. 4.)

"When the adverse claim is filed, a question is for the

first time raised as to the legitimacy and regularity of the claim and application, and the act of 1872 provides that that question shall be decided by the courts (or the adverse claim waived) before patent can issue." (P. 5.)

"Its jurisdiction is confined to deciding which party has the better right to a patent for the premises shown to be in dispute by the surveys on file in the land office." (P. 7.)

"It does not direct or allow a suspension for the trial of any other right or controversy, nor provide for a continuance of the suspension beyond thirty days from the time issue is joined, unless within that time the adverse claimant commences a suit to determine and settle the question involved, viz, the right of the applicant to a patent to the ground in controversy, in the land office." (P. 12.)

The language of the law makes the proceeding referred to in section 7 of the act of May 10, 1872, a proceeding "to determine the question of the right of possession." The law does not, as the counsel insist, make the action in court a proceeding to decide who is entitled to a patent, or to decide the legitimacy and regularity of the claim and application. The law does not provide that the question at issue can only be determined in the court by the application and adverse claim. Under the law, the courts have nothing whatever to do with the legitimacy or regularity of the application for a patent or of the adverse claim. But they have complete jurisdiction of every question possibly involved in the possessory action referred to in section 7. And this jurisdiction is just as complete before as after the application or adverse claim is filed. The possessory action may be commenced whenever the conflict of possessory rights occurs. The Law Reports of the mining States and Territories abound in such cases.

The court does not adjudge that the successful party is entitled to a patent, but that he is *entitled to possession.* Section 7 does not authorize an adjudication of the title to the patent by the court, but it provides that the party adjudged entitled to *possession* shall, upon proof that the requisite amount of labor has been performed, or improve-

ments made, and upon filing the proper description and paying the proper price and fees, receive a patent from the General Land Office.

It is true, as the counsel say, that the property involved in the proceedings in court and in those before the land office must be the same; but it is a new idea that property which has not been officially surveyed cannot be identified. It is also true that A cannot sue B this year for a cause of action which may accrue next year. But what that has to do with A's right to sue B this year for the possession of A's mine, unlawfully appropriated by B last year, it is not easy to perceive.

The counsel say, on page 8:

"The Anderson case, cited by counsel, is not applicable to the one under consideration. The statute under which that case arose was simply and purely a statute of limitations and restrictions. Instead of conferring rights upon the parties, it was intended to abridge them and to deprive them of the privilege of asserting them after a certain time."

In view of the fact that the captured and abandoned property act, under which the Anderson case arose, *conferred the original authority to bring the actions therein named*, while section 7 of the mining act of 1872 *confers* no authority to bring suit at all, but only *recognizes* that which already existed, it is impossible not to admire the boldness of the foregoing assertion.

Not less glaring is the misconstruction of the case of the Bullion Mining Company. Notwithstanding the differences between the acts of 1866 and 1872, if the precise contest originated by the application and adverse claim is *alone* cognizable by the courts under the latter act, just as certainly was the contest so originating *alone* cognizable by the courts under the former act. And if, as the counsel insist, the elements of such an action could not, in the nature of things, exist twelve days before the filing of the adverse claim in the present case, just as certainly could

they not exist in the case of the Bullion Mining Company two years before the filing of the application.

The Commissioner will see, by a reference to the cases of the San Augustine, San Xavier, and Gus Belmonte, that my statements respecting those cases are absolutely accurate in every particular.

In my reply to the former argument of counsel, I stated the fact that the ejectment was commenced after the application for a patent was filed, *because such was the fact;* not, as the counsel suppose, for the purpose of drawing a distinction between actions commenced before and after the filing of the application. It happened to be the fact in the pending case that the preparations for the ejectment and adverse claim were carried on simultaneously, and were first completed in the case of the ejectment suit.

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